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THE FEDERALIST

A COMMENTARY ON

THE CONSTITUTION OF THE UNITED STATES

BY

ALEXANDER HAMILTON, JAMES MADISON, and JOHN JAY

EDITED, WITH NOTES, ILLUSTRATIVE DOCUMENTS, AND A COPIOUS INDEX

BY

PAUL LEICESTER FORD

Editor of Pamphlets and Essays on the Constitution

NEW YORK

HENRY HOLT AND COMPANY

1898

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TO

THE RIGHT HONORABLE JAMES BRYCE, M. P.,

WHO HAS SO ABLY AND BRILLIANTLY
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THE FEDERALIST,

THIS EDITION IS DEDICATED.

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sinned against classes of citizens, and the people were threatened with a breakdown of all government, by the misuse of majority power. It has been the fashion of historians to blame the Congress of the Confederation with the ills of 1781–1789, but that was an honest, and, when possible, a hard-working body, and the real culprit was not the impotent shadow of national government, possessing almost no powers for good and therefore scarcely any powers for evil, but the all-powerful state legislatures, which proved again and again, as Jefferson asserted, that "one hundred and seventy-three despots would surely be as oppressive as one." [1]

The revolt of Shays, and the less aggressive but universal discontent against the state governments were protests too loud spoken not to warn the legislatures of their own peril, and in a frightened, half-hearted way, they one by one gave their consent to the assembling of a convention to plan such changes in the articles of confederation as should at least give to the state governments a national protection from their own citizens.[2] Accordingly, in June, 1787, a body of the most earnest and experienced men gathered in Philadelphia and set about the task of framing a new national government.

Not a few of the members of the federal convention had been sufferers by the injustice of state laws,[3] and they were prepared to apply the knife deeply to the malady of the body politic. Indeed, those who had but a few years before started out as strong democrats had re-acted. Dread of the people and dread of democratic government were felt by all those who did not draw the

[1] "Notes on Virginia," 157.

[2] It was fear that Shays's revolt would spread to within the borders of its own state that made the New York legislature vote the call for the federal convention, and the fright it gave Massachusetts was the cause for the assent of her assembly to what it had negatived but a few months before.

[3] As an example, Washington had bonds and mortgages to "nigh £10,000" paid off in depreciated paper money, worth at times as little as 2/6 in the pound, and when he attended the federal convention, he was in arrears for two years' taxes through having been unable to sell the products of his farms.

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distinction between popular control and majority control, between limited and unlimited governments.

From this fear of populace and of state governments, qualified by the necessity of framing a government which should be based on both, came certain clauses of the constitution the convention framed, which made it the instrument it is. The legislature or Congress was split into two bodies, that each might act as a check on the other, and strong executive and judicial departments were created, armed against the legislative by the once hated royal powers of appointment, veto, and annulment, that they might maintain their independence of the law-making branch, and even limit its power. Having split the Congress, the lower branch was given to the people, while the upper was given to the state legislatures, thus opposing a barrier to the will of the state governments in the House and to the will of the people in the Senate. Not daring to trust either people or legislatures to choose a president, a select body of citizens was created, to whom the choice of that official was assigned, thus making a second defense from the populace or state legislatures. To the President was given the appointment of the judiciary, thus removing that department, by a second selection, three degrees from popular choice or influence. Roger Sherman's plea to the convention that "the people should have as little to do as may be about the government" seemed fulfilled.

But the minimizing of popular control was only half the restraint that the convention had to create. The powers of the state legislatures, as the tools of the majority, must be also curtailed, or they would encroach on the general government as they had on their own. The laws of the nation were made, as the parliament laws once were, superior to state laws. Power after power was swept from the states: they could keep no troops or navy; they could not coin money, emit bills of credit, or pass tender laws; they could not enact bills of attainder, *ex post facto* laws, or laws impairing the obligation of contract. Such were the chief limitations,

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the true principles of republican government are unfolded with such precision."[1] This was echoed in 1830 by one of our ablest jurists,[2] who declared "There is no work on the subject of the constitution, and on republican and federal government generally, that deserves to be more thoroughly studied. . . I know not indeed of any work on the principles of free government that is to be compared, in instruction, and intrinsic value, to this small and unpretending volume of *The Federalist*, not even if we resort to Aristotle, Cicero, Machiavel, Montesquieu, Milton, Locke, or Burke. It is equally admirable in the depth of its wisdom, the comprehensiveness of its views, the sagacity of its reflections, and the fearlessness, patriotism, candor, simplicity, and elegance with which its truths are uttered and recommended." More recently the historian of the Supreme Court, after stating that *The Federalist* "has been seriously and reverently called the Bible of Republicanism," added "that for comprehensiveness of design, strength, clearness, and simplicity, the book has no parallel among the writings of men, not even excepting or overlooking those of Montesquieu and Aristotle."[3]

***

As certain defects in *The Federalist* resulted from its being written by three men, so this circumstance in time produced a controversy as to the exact share two of its authors had borne in the undertaking. The question has been needlessly complicated by the use of much material which had really no bearing on it, or which was valueless as evidence. Discarding all this, the dispute is reduced to the problem: did Hamilton, or Madison, write Nos. 49 to 58 and Nos. 62 and 63?

That either man should actually believe that he wrote

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[1] Jefferson pronounced it "the best commentary on the principles of government which has ever been written."—*Letter to Madison, November* 18, 1788.

[2] James Kent in "Commentaries" i. 241. Story, too, speaks of it as "an incomparable commentary."

[3] Carson's "History of the Supreme Court."

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twelve essays which he did not may at first sight seem impossible, but a recurrence to the circumstances at the time they were written proves that it was possible for both honestly to err. The essays were penned by men who had been reading the same books and listening to the same debates. Necessarily, therefore, their minds for the moment were saturated with the same material. The air was filled with certain principles and facts, which were used by both men, as well as by many others, and for this reason, any attempt to argue the question from mere similarity of thought, as is done in the special pleas of John C. Hamilton in his edition of *The Federalist* in behalf of his father, and of Professor E. G. Bourne in the *American Historical Review* for March, 1897, In behalf of Madison, are, so far as they argue from mere resemblance of idea, valueless as real evidence. From the letters of "Brutus," the great opponent of "Publius," could be selected a series of extracts that would go far to prove that he was the writer of the disputed essays of *The Federalist.* Undoubtedly, too, there was some consultation between the writers of "Publius" with inevitable mutual coloring, and the letters were written with such haste that no one essay could especially impress itself on the mind of the writer. But an even greater cause than this matter of "stock" phrases and exchange of ideas, for the confusion and resulting contradiction of the writers, was the fact that both Hamilton and Madison were members of the conventions in their respective states to discuss the constitution, and in their speeches necessarily went over the same points that had been discussed in *The Federalist.* Mention has already been made of the fact that Hamilton was charged with "retailing" Publius to the New York state convention, and a reading of Madison's speeches in that of Virginia shows that he, too, made large drafts on *The Federalist.* When, therefore, the moment came that its writers could look over the collected edition, it is not strange that much of it read so familiarly to each that he honestly thought himself the writer. Granting the possibility, therefore,

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but many minor ones swelled the list. The dread of the legislative branch was so strong that Congress itself, balanced and checked though it was to be, was restrained from certain legislation. The misuse of power by the state legislatures had ended, as it always does, in loss of power.

To ask a majority to limit their law-making ability, both in their state and national legislatures, so that they could no longer abuse the minority, and to ask them to part with the direct delegation of three-fourths of the general government, was a daring proposition. The state officials, as the creatures of the legislatures, were naturally opposed to it; while nothing but the previous abuses from which the country was still suffering would ever have made it possible that the constitution would have been accepted by the majority; and even those were insufficient to make the people take the new constitution readily.[1] Much argument and many devices were needed in most of the states to obtain its ratification. To aid in its adoption *The Federalist* was written, and of that nine-months' campaign it was a distinct factor.

***

How far the government thus drafted and thus commented upon has fulfilled the intention of the men who framed it in the federal convention and the predictions of the men who analyzed it in *The Federalist*, could be reviewed at much length, but only a few results need be touched upon.

There can be no question that the national government has given to the minority a greater protection than it has enjoyed anywhere else in the world, save in those countries where the minority is a specially privileged aristocracy and the right of suffrage is limited. So absolute have property rights been held by the Supreme Court, that it even, by the Dred Scott decision, in effect made the whole country a land of slavery, because the

[1] John Quincy Adams said that the constitution was "extorted from the grinding necessity of a reluctant nation."

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slave was property, and the rights of property were sacred. Once only, by the third legal-tender decision, has the court markedly failed in the chief purpose for which it was created, and this failure is the more extraordinary, for none knew better than the judges that it was to prevent just such outrages as fiat money that the national government was created, and that the very words "legal tender," except as applied to intrinsic money for commercial and legal convenience, are a lie and a fraud, through which someone is to be robbed. To allege that the "right to make notes of the government a legal tender" has been deemed "one of the powers of sovereignty in other civilized nations," which were the grounds on which the decision was based, was to place our national government on a par with those which have notoriously been planned for the benefiting of some at the expense of others, and to destroy the very pledge of justice that the majority gave to the minority in 1788. The pride of this country has been that elsewhere the majority or the minority, depending on the degree of power enjoyed by each, has abused the other, but that here they were equal before the law.

In its secondary function, of protecting the minority from the state legislatures, the general government, wherever it possessed jurisdiction, has been equally successful. By the eleventh amendment the power of citizens to sue a state in the national courts was forbidden, and this has allowed state governments to repudiate and in other ways rob, as of old, but wherever the jurisdiction of the Supreme Court has reached, it has honestly and fearlessly protected the minority from the majority. This has at moments produced intense feeling against the national judiciary by the states, and between 1818 and 1832 a long series of legal conflicts took place, leading to many protests by the state legislatures. But though the state governments successfully resisted in a few cases the mandate of the court, the advantage was only temporary, and to-day no state dares to resist, however much it may question, a decision.

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Turning from the question of how far the main purpose of the national government has been achieved, we meet the question of how far the constitution has fulfilled the intention of its framers, as regards the government it established.

The object of the framers was to create three separate and distinct departments, so balanced as to powers and force that they should be safe from each other. Time has shown that they succeeded. In 1801–03 the legislative and executive branches united in an attack on the judiciary, removing judges appointed for life, and even suspending the sitting of the Supreme Court, but without permanent results, and the judiciary maintained its power and independence. During the Civil War the President by his assumption of "war powers" reduced the power of Congress materially, but when the necessity was passed, it was found that the legislative branch had lost no real prerogative. In 1867 Congress savagely attacked the President, but the Executive influence and strength suffered no diminution.

By the division of the Congress into two chambers, so that both a majority of the people and a majority of the states should be necessary for legislation, it was hoped that both the people and the state governments would be protected from national encroachment, and this end has been realized. Its secondary purpose of acting as a check on hasty and unnecessary law-making has likewise been fulfilled. At moments the diverse composition of the two bodies has resulted in material disagreements, which have produced angry controversies. For the time these have put one of the branches out of public favor, and usually this has been the Senate—which was inevitable, since its very purpose was to check the will of the majority of the people. Eventually, however, accord has always been obtained, and in looking back over a hundred years of Congressional legislation the disagreements are found to have had very little influence on our history.

Both Houses of Congress have made continual at-

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tempts to rob the President of the power of appointment, and whenever that official has been the "favorite son" of political machines, or has sought to influence the action of Congress on legislation, they have to an extent succeeded; so far indeed as to lead members of Congress to this day to assert the right of selecting local officials; but whenever the President has been a man of strength, he has refused to recognize this claim. Such action has usually produced antipathy in Congress to the President, and the Senate has sometimes, in irritation, negatived Presidential nominees, but otherwise the legislative department is helpless, and every President who has selected his own officials has added distinctly to his popularity with the people, if not with the politicians. Fortunately the steady extension of the civil-service laws promises shortly to remove this bone of contention.

Though the fathers' fear of a coalition of the small states in the Senate has not been realized, something akin to it has developed by the rapid admission of new states. As a result, by "holding-up" or "dickering" over legislation, the senators of this coalition of small states, though representing an inconsiderable minority of the whole people, have succeeded in placing laws on the statue books that were not for the best interests of the country. This evil is purely temporary, and will pass with the growth of population in the new states.

A second defect in the Senate, due to the fact that it is a delegated body, and therefore not directly responsible to the people, has been its tendency to extravagance, and in this body all class legislation, whether bounties, pensions, protective duties, internal improvements, or railroad grants, finds its warmest advocates, if not its paid attorneys. This has produced a constantly recurring discussion as to whether it would not be best to make it a directly elective body by the people of each state.

The method of choosing the President has proved hopelessly inoperative. The wish of the framers was that the electoral college should select a president for the people, but the people would none of it, and have

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always insisted upon voting for a president and not for a proxy. The result has been that the president, being the only part of the government for whom the whole people vote, has absorbed by far the greater part of governmental popularity, and is to-day, in most people's minds, the dominant figure in the national government. Certainly the past goes to show that popular choice has on the whole been safer than selected choice could ever have been, for the Presidents chosen by the people have been successful, while those brought forward by politicians have been failures. Another illuminating fact is that the Vice President is always the choice of the politicians, the people taking little interest in the selection of that official; and his almost invariable failure is equally well known.

As the method of choosing the President has proved wholly inoperative, so too it has proved markedly inefficient. Twice it has broken down to an extent that has threatened the safety of the government, and twice it has placed in office men not fairly elected, thus defeating the will of the people. The Electoral College has lost its object, and only endangers the country in every Presidential election. An amendment to the constitution, doing away with it, and making the President elected by the people, is the most necessary revision the compact needs.

The President has not, as even the convention feared he might, endeavored to make himself king or dictator; he has not even made any marked attempt to perpetuate himself in office. In moments of necessity he has overridden the constitution and usurped such powers as he deemed necessary, but never with the object of personal aggrandizement or injury of the people. Nor can there be any question that the Presidents who have so acted, have done it with reluctance, and were the first to end the exercise of such extra-constitutional sway, when the conditions allowed. If American democracy had done nothing else, it would have proved its right to fame by the fact that it has chosen twenty Presidents, not one of

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whom has attempted to subvert the government or to override the will of the people in any essential point. This is the more remarkable as five of these Presidents were chosen because of conspicuous military service.

But the distingushing feature of the American government has been the judicial department. At moments its judges have cast impartiality behind them, and descended into the political arena. At other times the Supreme Court has shown indecision or instability. It has been "packed" to secure a particular verdict, and has rendered the desired opinion. It has put itself so out of accord with public sentiment that its decrees were successfully overriden or disregarded by the Congress, by the President, by the state executives and courts, or by the people. It has been temporarily the most hated feature of our government, and a recurring popular cry has called for its curtailment or alteration. But in the main it has admirably fulfilled its purposes. So far from grasping power, it has constantly sought to differentiate federal jurisdiction from that of the states, and though its influence is widening, it is because the necessities of national development require it. Because it is the one ultimate court in the world which is allowed to annul as well as to expound a law, it stands as the greatest protector of the minority now known; and because this power has in the main given justice as well as legality to its decisions, the court has won an enviable reputation for fairness, and consequently a respect nowhere else obtained. No matter how unpopular its decisions may be, they are submitted to without question. "We shall abide by the decision," said Lincoln, even in the heat of the Dred Scott excitement, "but we will try to reverse it."

The greatest test of the success of the framers is to be found, however, in the general rather than in the governmental history of the constitutional period. Within that time our territory has been more than tripled, and our states have been mutiplied by over three. Our population has grown from three to seventy million, and we have received foreigners in such numbers that some of

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these nationalities now exceed the whole number of Americans at the time the Constitution was framed. We have fought a war with the most powerful nation of Europe, and conducted within our own borders the longest great war since the Napoleonic epoch. Yet to-day our people are as free as they ever were, our government as efficient, and though the constitution has many times been overridden or disregarded, with scarcely an exception the ending of the crisis that led to such action has been followed by a contraction of powers to constitutional limits. After a hundred years of testing the national government stands to-day as the only one which has existed for a century without changes that were in effect revolutionary, and it is the only one able to enforce its laws on seventy millions of people without creating within itself a spirit of resistance and revolt.

Yet the federal constitution would have failed, as every government must fail, but for the faculty of self-government inherent in the people it nominally governs. Of what use would constitutional guarantees to the minority be, if the majority chose to disregard them? Of what use would a supreme court be, if its decisions were not acquiesced in? The constitution is alterable, the Supreme Court or the limitations can be amended at the will of the people. The constitution has been overridden, the people have disobeyed the laws. The success of our national government is due, not to its principles or structure; it is due to the fact that it gives to the majority the right of governing the land provided their laws shall be equal in operation, and that with this degree of power the majority has been content. It is, therefore, but one expression of what is the cardinal element of good government: a self-controlled people, given to excess in neither law-making nor in law-breaking.

***

On September 17, 1787, the federal convention, after nearly four months of anxious work, completed the framing of the compact since known as the constitution of

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the United States, and forwarded it to the Continental Congress, accompanying the instrument with the request that the proposed plan of government might be submitted to conventions of the people in the various states, for their discussion and ratification or rejection. The result of this recommendation was almost to turn the country at large into a vast debating society, and for nine months public speakers, pamphleteers, and newspapers declaimed and argued. Probably in no other time or country have the principles of government ever been so universally and elaborately discussed.

Even before the convention had made the result of its labors public, it was notorious that a large and powerful party in the state of New York was prepared to oppose whatever that body should submit. In the instructions of that state to her delegates to the federal convention, an attempt had been made to insert a restriction that any alterations made in the articles of confederation "should be not repugnant to, or inconsistent with, the constitution of this state,"[1] a motion lost by but one vote, and the instructions actually adopted only modified this limitation to the extent that the New York delegates were restricted to "the sole and express purpose of revising the articles of confederation."[2] When therefore the convention, discarding the old government, set about the framing of a new one, two of New York's three delegates, Robert Yates and John Lansing, Jr., withdrew from the convention on the grounds that the body had wholly exceeded its power, and united in an open letter of protest to the Governor of the state, George Clinton;[3] and though the third, Alexander Hamilton, refused to be bound by their action, and eventually signed the constitution, his act unquestionably transcended his powers.

Lines were therefore already drawn, when on September 27, 1787, the constitution was published in the New

[1] Motion of Roberts Yates, Journal of Senate.
[2] Elliot, ii. 127. [3] *Ibid.*, 480.

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York press, and how well prepared were the opposition (or "Anti-federalists" as their opponents promptly named them), is proved by the fact that, on the very day of its publication, there appeared in the New York *Journal*, the organ of the "state machine," a letter signed "Cato," sharply and ably attacking the proposed government, written, as was very quickly known, by no less man than Governor George Clinton himself. From that time, till the meeting of the Assembly in January, 1788, gave other occupation, Clinton continued the attack in a series of letters over the same pseudonym.[1] More dangerous still was another series, under the pen-name of "Brutus," begun a little later[2] than those of Cato and far exceeding them in both ability and number, which were notoriously written by Robert Yates, judge of the state supreme court, and one of the delegates who had withdrawn from the federal convention. These two writers were re-enforced by a host of minor scribblers.

Hamilton was too warmly in favor of a strong national government, was too powerfully committed to the proposed constitution, and held too ready a pen, to allow these attacks to go unanswered. But three days after the publication of the first letter of "Cato," a reply to it, under the signature of "Cæsar,"[3] appeared in the papers, keenly personal[4] in character, and virtually warning the "Anti-federalists," that they could "take" the "proffered constitution," or run the risk of seeing a government forced upon them by an army. Furthermore, "Cato" was told that, "in his future marches," he would very probably be followed by "Cæsar."

The want of political tact thus shown, typical indeed of Hamilton through all his life, was eagerly seized upon by "Cato," and in his second letter he cleverly animadverted

[1] Reprinted in Ford's "Essays on the Constitution."
[2] *New York Journal*, November 1, 1787.
[3] Reprinted in Ford's "Essays on the Constitution."
[4] Washington complained in November, 1787, that "I have hardly seen one [publication] that is not addressed to the passions of the people."

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on these imperious and ill advised warnings, and closed by telling "Cæsar," in turn, that no notice would be taken to what he might in the future write. To this "Cæsar," replied in a second letter, in which, as if he had not done harm enough, he went to the lengths of writing that "I am not much attached to the *majesty of the multitude*," and therefore "waive all pretentions (founded on such conduct), to their countenance." But even the author seems to have felt that he had begun his appeal to the people amiss, for at the end he gave notice that "Cæsar" would not reply further to "Cato."

This did not mean, however, that Hamilton resigned the field to his adversaries, but merely that he intended to change his ground. "Since my last," he wrote a correspondent (presumably Washington), "the chief of the state party has declared his opposition to the government proposed, both in private conversation and in print. That you may judge of the *reason* and *fairness* of his views I send you the two essays, with a reply by 'Cæsar.' On further consideration it was concluded to abandon this personal form, and to take up the principles of the whole subject. These will be sent you as published, and might with advantage be republished in your gazettes."[1] Nor was it only his friends who knew of this change of plan, for the organ of the Anti-federalists promptly announced that, "a writer in the state of New York, under the signature of 'Cæsar,' came forward against the patriotic 'Cato,' and endeavored to frighten him from starting any objections, and threatened that 'Cato' would be followed by 'Cæsar,' in all his marches; but we find that as soon as ever 'Cato' came freely to discuss the merit of the constitution, 'Cæsar' retreated and disappeared; and since that a publication under the signature of 'Publius' has appeared in that state."

To write such a treatise on the "principles of the

[1] See Ford's "Essays on the Constitution," 245.

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whole subject," was a task of no little labor, but to write it in the few months before the assembling of the New York state convention (if not before the elections for members of that body), and so that it might at once begin the work of counteracting the influence of "Cato" and "Brutus," involved a rapidity of composition to which Hamilton himself was unequal. He therefore sought the assistance of two others in the undertaking[1] and secured the aid, first of John Jay, then Secretary of Foreign Affairs, and second of James Madison, a member of the Continental Congress from Virginia, who had recently distinguished himself in the federal convention by his able elucidations of the general theory of government; a form of study in which Virginians had already made themselves famous. To Jay was assigned the discussion of government in its relation to foreign affairs, and to Madison was apportioned the historical and theoretical part, with an analysis of the general powers of the new government; Hamilton taking himself the examination of the defects of the confederation, and the exposition of the proposed constitution in detail, for both of which he was peculiarly fitted.

Even thus divided, it was a difficult task to produce the weekly tale of essays alternately published in the *Independent Journal* and the *Daily Advertiser;* and the mere magnitude of the labor can best be understood when it is noted that "Brutus," the ablest writer in the opposition, wrote only sixteen letters, while eighty-five appeared over the name of Publius, the periods of publication being almost identical.

The last letter of "Cæsar" was published on October 17, and on October 27 "*The Federalist*, No. 1," addressed to the "The People of the State of New York," over the pen-name of "Publius," was printed in

[1] "The undertaking was proposed by Alexander Hamilton to James Madison, with a request to join him and Mr. Jay in carrying it into effect." (*Madison in a paper entitled "The Federalist."*) "It was undertaken last fall by Jay, Hamilton, and myself. The proposal came from the two former."—*Madison to Jefferson, August 10, 1788.*

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the *Independent Journal*.[1] This announced itself as the initial number of a series of essays on the proposed constitution, and briefly outlined the intended scope of the work. In eighty-five letters, published in the succeeding seven months, this task was completed.

The marked excellence of the letters of "Publius" attracted instant attention, and led to the republication of the earlier numbers in the larger part of the American press, even the *New York Journal*, the organ of the Anti-federalists, being finally forced to print them for a time.[2] The demand indeed was sufficient to produce the prompt advertisement of a collection of the series in book form, and it was published while the constitution was still a matter of debate.

That *The Federalist* produced any marked influence at the time in leading to the acceptance of the new government is questionable, for it was a moment of passion, rather than of reason, and the followers of Clinton were too bound by selfish interests to let abstract reasoning really influence them. A good Federalist could only say of the work of "Publius" that "he is certainly a judicious and ingenious writer, though not well calculated for the common people."[3] As for the Anti-federalists, they made no pretense of regarding the arguments. "'The Federalist,' as he terms himself," wrote one, "or 'Publius,' puts me in mind of some of the gentlemen of the long robe when hard pressed, in a bad cause, with a rich client. They frequently say a good deal which does not apply; but yet if it will not convince the judge and jury, may perhaps, help to make them forget some part of the evidence—embarrass their opponents, and make the audience stare."[4]

The New York elections for delegates to the state

[1] It has been stated by Rives and Bourne that the early letters were signed "A Citizen of New York." This is an error, the only use of that pseudonym being in an advertisement of the first collected edition.

[2] It printed later a petition from thirty subscribers that the paper would cease from republishing *The Federalist*.

[3] Maclaine to Iredell, March 4, 1788.

[4] *New York Journal*, February 14, 1788.

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convention well proved that "Publius" had written in vain, for only one-third of the men chosen were Federalists—making the contest one of the most crushing defeats ever experienced by the Anti-Clinton party. Nor were the members of the convention when met, any more open to persuasion than the people had been. "I steal this moment," wrote one, "while the Convention is in Committee and the little Great Man employed in repeating over Parts of Publius" to write; and another, when an Anti-federalist was charged with having "compiled" his speech from the New York papers, replied that "if so, he had as much credit with me as Mr. Hamilton had, *for retailing* in Convention, Publius."

But if the masses were held to the democratic party in the state by the arguments of "Cato" and "Brutus" and were deaf to the reasoning of "Publius," there was a limit to what they could be made to accept. That the federal compact robbed them of power, and was a "gilded trap," leading to consolidation and to eventual tyranny, they had strong reasons for believing, but when the state machine, triumphant in shaping public opinion to this extent, went one point further, and advanced the idea of separation from the Union, which indeed was the logical outcome of a rejection of the constitution, it was not followed by the rank and file. In the history of the United States disunion has been often talked and sometimes attempted by political leaders, but not once have the masses accepted it. The only serious endeavor to break up the country which has ever occurred was in a section where those who should have been the controlling citizens were chiefly slaves, unable to make their influence a power; and even there, in the mountain regions, where the plain American resembled his more northern countryman, disunion never prospered. From 1774, if not earlier, the leaders have upheld or denounced a united country, according to their selfish or sectional views, but the unspeaking masses have felt, what it took statesmen years to learn, that there was but one people and one nation, be the states thirteen or thirty. In 1788 the

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majority might vote against a frame of government; they could not be brought to vote against the Union.

But another and more concrete difficulty existed to obstruct the plans of the Clintonian leaders. The Anti-federalists were a landholding and therefore an up-state party, while New York City and its immediate vicinity were controlled by the commercial and mechanic classes, so strongly federal in their feeling that at this very election for the convention, though the opposers of the constitution had won overwhelmingly elsewhere, yet in New York City the Federalists drove the Anti-federalists from some of the polls by force, and even where this was not done the vote stood as ten to one for their ticket. "Reject the constitution," threatened the federal leaders, and "a separation of the Southern District from the other parts of the State . . . would become the object of the Federalists and of the neighboring States."[1] This would not merely exclude the inland part of the state from the Union, it would shut it out from the sea. Worse still, it would lose to the country sections their share of the large revenues arising from the imposts on the rich commerce of New York City, and as this revenue was a principal reason for the refusal to join the Union (because of its necessary transference to the general government), the certain loss of it by a secession of the City removed a powerful motive of the Anti-federalists for opposing the constitution.

This danger of division, therefore, made the triumph of the Clinton party more apparent than real, and not daring to reject, nor willing to accept, the opponents of the constitution could only adopt the policy of delay, hoping that enough states would reject the new government to prevent its organization. Having postponed the state convention as long as possible, to gain time, it was next proposed when that body had met that they should take a "long adjournment as the safest and most artful course to effect their final purpose."[2] But as state after state accepted the constitution such action became

[1] Hamilton to Madison, June 8, 1788. [2] *Ibid.*

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to extreme, and in place of it a plan of conditional amendments was brought forward, by which the state could later withdraw from the Union. Rather than risk further contest, this compromise was at first favorably received by the Federalists; the one side hoping that the new government would prove so great a failure or so hard a master that a favorable opportunity would come for rescinding the ratification, while the other foresaw that, a ratification once obtained, there would be little to "fear in the future." But while this compromise was still in embryo news reached the convention that both New Hampshire and Virginia had ratified the constitution, making ten states in all, and insuring the organization and trial of the new government. The Federalists therefore became less yielding and finally wrung from their opponents an unconditional ratification. What the arguments of "Publius" could not bring to pass had been extorted from the majority of the state by the majority of the states and a minority of its own citizens.

But if *The Federalist* was an uninfluential factor in the actual struggle for ratification, it was because of the nature of the contest, and not from want of ability. It is true that serious defects, due to the circumstances of its production, are obvious. Although intended to be a systematic work on republican government, it was even more a plea for the adoption of this particular constitution, and therefore had quite as much of the legal brief as of the philosophical commentary on government. Not one of the authors of *The Federalist* entirely approved of the constitution, but none the less they were called upon to defend it *in toto*. "In some parts," wrote Jefferson, immediately after its publication, "it is discoverable that the author means only to say what may be best said in defense of the opinions in which he did not concur," [1] proving that some of the arguments were so half-

[1] "Though carried on in concert, the writers were not mutually responsible for *all* the ideas of each other; there being seldom time for even a perusal of the pieces by any but the writer, before they were wanted at the press, and sometimes hardly by the writer himself."—*Madison to Jefferson, August 10, 1788.*

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hearted that the author's true thoughts stood revealed. As essays intended to combat the letters of "Cato" and "Brutus," frequent digressions and repetitions were made to disprove such postulates of those publications as were found to influence the people. Written especially to influence the voters of the state of New York, its references to local circumstances, and especially to the state constitution, were constant. Furthermore, the work was written with the utmost haste by three men, with few opportunities to consult, leading to frequent duplication, and to some inconsistencies. "The haste," wrote one of its authors, "with which many of the papers were penned in order to get through the subject while the Constitution was before the public, and to comply with the arrangement by which the printer was to keep his paper open for four numbers every week, was such that the performance must have borne a very different aspect without the aid of historical and other notes which had been used in the Convention, and without the familiarity with the whole subject produced by the discussions there. It frequently happened that, while the printer was putting into types parts of a number, the following parts were under the pen and to be furnished in time for the press."[1] "The particular circumstances," wrote Hamilton, in the preface of the first collected edition of *The Federalist*, "under which these papers have been written have rendered it impracticable to avoid violations of method and repetitions of ideas which cannot but displease a critical reader."

Yet despite these adverse conditions, the writers of *The Federalist* produced a work which from the moment of publication has been acknowledged to be at once the ablest commentary on the federal constitution and one of the most solid and brilliant works on government ever written. "It would be difficult," wrote a critic[2] in 1788, "to find a treatise which, in so small a compass, contains so much valuable political information, or in which

[1] Madison, in paper entitled "The Federalist."
[2] Noah Webster in *American Magazine* for March, 1788.

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that both men could be misled, the question becomes not what each author thought, but purely what other evidence than their opinions goes to prove.

Before dismissing this question of memory, one fact of value cannot be omitted. Madison set out for Virginia three days after the last essay in dispute was published, was quickly engaged in the heat of party strife tending to obscure his memory on the question of authorship, and making it improbable that he could give the volumes of *The Federalist*, when they presently appeared, any careful examination for some time. Strange though it may appear, Madison apparently possessed no copy of the first edition, having presumptively given away all those sent him by Hamilton. On the contrary, while Madison was engaged in occupations likely to make him forget or confuse the part he had borne in the undertaking, Hamilton was revising the newspaper articles and seeing them through the press for the book edition. There is not an essay in the collected edition of 1788 in which he did not make from ten to twenty verbal corrections, implying careful study of the text, and as this revision was done within two months of their appearance in the newspapers, and before Hamilton had confused matters by "retailing" Publius in the New York convention, it is obvious that he refreshed his memory in a way most certain to fix the authorship clearly in his mind.

These facts being considered, it becomes of importance to find what is the earliest date at which each of the disputants asserted his claim of authorship. So far as is known Madison's was first noted in a copy of the edition of *The Federalist* printed in 1799, or eleven years after the appearance of the essays. Hamilton's earliest statement was made to Chancellor Kent, and as he is spoken of in the memoranda as "General Hamilton" it must have been made while he held that rank, or in the years 1798 or 1799. Thus both assertions practically rest on equal ground, so far as time is concerned.

But one piece of evidence deserves mention, because it

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seemed at one time to threaten that Madison's claim was to be lost by default. Hamilton's list was published in a widely read periodical in 1807, and the edition of *The Federalist* printed in 1810[1] gave further currency and authority to Hamilton's view by ascribing the numbers according to one of his statements. Yet not one word of denial was publicly made by Madison, or by any of his friends for him, until 1817. It has been urged in explanation that Madison's official positions prevented his entering into a controversy, but an adequate reply is furnished by the fact that through his friends the Secretary of State and President conducted several newspaper controversies in these very years.

Another point worth considering is the fact that Hamilton held by far the readier pen, and as the originator of the series undoubtedly intended to take the laboring oar. Madison was the last one of the three to join in the undertaking, and in the first thirty-six essays he wrote but two entirely by himself, the remaining three in which he bore a part having been begun as well by Hamilton. With this in mind let us consider the circumstances that mark a peculiarity in Madison's chief share in the work. At No. 37 Hamilton for the time being ceased all work, and Madison took up the task and wrote twelve consecutive essays, immediately following which come the twelve in dispute. The question naturally arises why Hamilton should suddenly transfer to Madison the continuance of the series, throwing upon him all the work, and the reason is not far to seek. No. 36 of *The Federalist*, or the last of Hamilton's contributions, was published on January 8. On January 15 the New York state supreme court began its winter term, and Hamilton as a busy lawyer was called upon to attend it.[2] Furthermore, on January

[1] One fact of interest in this edition is that it gives Hamilton as the author of No. 54, thus showing that there was a list "in his own handwriting" in existence at that time, which corrected the obvious error he made in the Benson list.

[2] That the courts gave Hamilton so much occupation as to force him to suspend his work on *The Federalist* is proved in a letter from him to Madison in April, 1788, when he wrote, "If our suspicions of the

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11 the New York state legislature assembled, and Hamilton, who was a candidate for membership of Congress, was involved in a political campaign akin to the modern senatorial election. These joint occupations necessarily made such drafts upon his time that he could not continue *The Federalist*, and that there should be no break in it Madison assumed the entire task of carrying it on. The term of the court ended on January 25, and on February 22 Hamilton was elected to the Continental Congress. We therefore have the choice of inferring that Hamilton at once resumed his work[1] on *The Federalist* or else that he resumed it when Madison went south.[2]

Turning from these extraneous facts to those which can be drawn from the essays themselves, the first point deserving consideration relates to a condition implied by joint authorship. A moment's thought will suggest that a work produced in this manner must force upon each writer a little difficulty in maintaining in a nominally consecutive work an appearance of homogeneity. Where an essay was to follow one written by the same author sequence was possible, but when it was to succeed one he had not written or read, the task was not easy. Necessarily then, one would expect a certain disjointedness of connection, and this is the very thing discovered on examining the points where a new writer assumed the pen. Thus No. 10, by Madison, is an essay on faction, yet though the preceding letter was on the same subject, it

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author be right he must be too much engaged to make a rapid progress in what remains. The Court of Chancery and the Circuit Court are now sitting." Turning to *The Federalist* we find at this very point a gap of over two months in the publication of a number.

[1] No. 48 was published on February 2: Madison began his southern journey on March 4.

[2] A very valuable piece of evidence on this question of authorship has been buried from sight by the mistakes of Hamilton's two editors in labeling a paper printed in both editions as a "Brief of Argument on the Constitution of the United States," though the manuscript of the paper bore no heading whatsoever. Study of it should have clearly indicated that it is a preliminary outline of *The Federalist* from the point that Hamilton was interrupted in his composition by his legal and political occupations, and it was presumably drawn up as a guide for Madison in his continuance of the task. See *post*.

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does not continue the first, but is a distinct essay. Following this are three essays on the defects of the confederation, by Hamilton, and then comes No. 14, by Madison, which is really a continuation of No. 10, and is therefore an absolute break in the subject of both the letters which precede and follow it. If the authorship of these six numbers were not known it would be possible to decide, from internal evidence, at what points a different writer undertook the labor. Nor does the obvious difference between a man opening an essay which follows one by himself or one by another, fail to show itself at every change of writer that is known to have occurred. By examining the opening phrases of Nos. 10, 14, 18, and 37, in which Madison began his contributions, the disconnection with the preceding numbers is obvious, and the same is true of Nos. 2 and 64 in which those by Jay began. But most marked of all are the opening sentences with which Hamilton resumed his part, and as they are of value, in the present consideration, they are quoted here:

6. "The last three numbers of this work have been dedicated to an enumeration of the dangers". . .

11. "The importance of the union in a commerical light". . .

15. "In the course of the preceding papers, I have endeavored". . .

21. "Having, in the last three numbers, taken a summary review" . . .

Here, then, in three cases, are evident attempts to attach new subjects to previous essays so as to imply a sequence that was absent in the subjects and treatment. With this as a clew, if we run through the letters from Nos. 37 to 63 (after which there is no dispute), but two natural breaks are to be found—at Nos. 47 and 52, which severally begin:

47. "Having reviewed the general form of the proposed government" . . .

52. "From the more general inquiries pursued in the preceding four last papers" . . .

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If the analogy of the previous openings is allowed as evidence, it is at one of those two points, then, that we should conclude that a new writer had begun.

With these facts to work upon, an examination of the five essays, Nos. 47 to 51, shows them to be a discussion of the apportionment of the powers of government among the three departments. The general extent of these powers had been already discussed in the immediately preceding numbers, and a more minute survey of their relation to the three departments is the subject of the remaining essays almost to the end. They can, therefore, be considered as belonging to either. From Madison himself, however, we get a clew, for in No. 41 he distinctly assigns them to the second series.[1] But whether this is accepted as proof, an examination of the five forces the inference that they were all written by one man.

The authorship of Nos. 37 to 48 is given to Madison by every known list, so it is difficult to avoid concluding that the apparent break between Nos. 46 and 47[2] merely represent the beginning of a new subject by the same pen, and not a change of writer. Furthermore we have the excellent authority of James Kent for the statement that "Mr. Hamilton told me that Mr. Madison wrote 48 and 49, or from Pa. 101 to 112 of Vol. 2d." No. 50 was almost surely written by the

[1] "The constitution proposed by the convention may be considered under two general points of view. The First relates to the sum or quantity of power which it vests in the government, including the restraints imposed on the states. The Second, to the particular structure of the government, and the distribution of this power, among its several branches.

"Under the first view of the subject two important questions arise: 1. Whether any part of the powers transferred to the general government be unnecessary or improper? 2. Whether the entire mass of them be dangerous to the portion of jurisdiction left in the several states?"—*Opening paragraphs of No. 41.*

[2] One curious fact, to which attention has never been called, is that Taylor, in his "New View of the Constitution (1823)" divides the authorship at No. 46, giving No. 47 and all that follow to Hamilton. Yet though he was the friend and correspondent of Madison, and though this book was a well-known one to the latter, neither publicly nor privately, so far as is known, did Madison correct Taylor's conclusion.

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same hand which penned No. 49, and No. 51 was certainly composed by the writer of No. 50. In addition these essays discuss the powers from the purely historical and theoretical standpoint, views for which Madison had strong predilections. A candid survey of the facts, therefore, will, we think, lead every unbiased student to assign them to one author, and the balance of evidence certainly points to James Madison.[1]

But the same internal evidence shows that with No. 52, a minute and homogeneous examination of the structure of the government is begun, in which the three departments are analyzed point by point. That one man wrote Nos. 52 to 58, that a second contributed Nos. 59 to 61, that then the original writer resumed his work in Nos. 62 and 63, and that finally the task was again assumed by the second writer, and completed by him, the essays themselves give no evidence. With the exception of the insertion of one essay (No. 64, on the treaty-making power of the Senate, which was given to Jay, because of his diplomatic experience), it is difficult to resist the conviction that the whole remainder of the letters are the work of one writer and one prone to take the practical rather than the theoretical view of things.

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[1] One rather singular piece of evidence contradictory to the above conclusion is furnished by the comparative length of the different essays. When examining in the newspapers the original text of *The Federalist* my attention was called to the fact that the letters contributed by Hamilton rarely overran a column and a half, while those by Madison seldom filled less than three columns. I therefore carefully estimated the lengths of each man's work, to find that the average length of the fifty essays unquestionably written by Hamilton is 1800 words; of those certainly written by Madison, 3000 words. Madison wrote in the undoubted numbers (No. 10, 14, 37–46,) but two essays of less than 2300 words, and Hamilton but once wrote one of 3000 words, except in the last five, when an evident attempt was made to finish the series up quickly. Testing Nos. 49 to 58 and Nos. 62 and 63, the average length is found to be 1800 words. No. 47 contains 2700 words; No. 48, 1800; No. 49, 1600 words; No. 50, 1100 words; No. 51, 1800 words; No. 52, 1700 words. It is needless to add, to anyone who has studied the writings of the two men, that the differences between the two styles in this very respect is most noticeable. Madison is wordy and seems to have little ability to express an idea with brevity. Hamilton is direct and compact to an extent which made him a famous draftsman in his day, and few men have ever equaled him in his power of stating a thing tersely.

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Examining Nos. 52 to 58 and 62 and 63, in detail, we find several small facts which throw light on the question of authorship. In Nos. 52, 56, 57, 58, and 63, are citations of examples in English history, like references being numerous in many of Hamilton's essays, but only two passing references to Great Britain are to be found in any of those written by Madison.[1] The same difference is noticeable in the papers prepared by the two writers for use in the federal convention—Hamilton's "Brief" of his speech, and Madison's "Notes," the first citing British example frequently, the latter not once.[2]

In Nos. 53, 54, and 56, are paragraphs discussing taxation, and the first and last of these letters also discuss the militia, both of which subjects Hamilton had familiarized himself with, and which he had made his own topics in the earlier essays.

No. 54 is a discussion of slave representation, written nominally from the Southern point of view, but really from the Northern. Not once did Madison allude to this famous clause in the Virginia convention, but Hamilton spoke a résumé of this essay in that of New York. The cause for this is obvious: the "federal number" needed no defense in Virginia; in New York, the contrary was true. But an even greater reason for Hamilton's taking up this particular point was the fact that on February 7, 1788, there had appeared in the New York *Journal* a letter entitled "The Expositor," savagely attacking the slave compromise and charging of Hamilton himself that "The delegate from this state acceded to it alone on the part of this state," and adding, "I cannot help thinking it a most daring insult offered to the freemen and freeholders of this State, besides being an unparalleled departure from his duties to this state as well as to the United States." Necessarily this attack could not

[1] I omit here the résumé in No. 47, because from what has already been shown, this number cannot be positively ascribed to Madison.

[2] In Madison's supplementary notes, prepared for use in the Virginia convention, he cites British example, but this was after *The Federalist* had called his attention to the value of the material.

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be disregarded, and the impersonal reply to it in No. 54 was published exactly one week later, on February 14. It seems almost conclusive under these circumstances that it was written by Hamilton. Another opinion in this number furthers this probability. The writer praises the "federal number," on the ground that it introduces through the slave a partial representation of property. This was a favorite idea of Hamilton's, for which he had spoken in the federal convention, and for which he praised this clause in one of his speeches in the New York convention. To this idea of property representation Madison was absolutely opposed.

In No. 52 the writer is in doubt as to the term of office of the colonial assembly of Virginia before the Revolution; a fact so notorious in that state that it could not have been unknown to Madison.

In No. 63 the writer praises the British House of Lords; something Madison would not have done. Hamilton, on the contrary, had been most open in his admiration of the British government, and so admired this particular branch of it that he had but just modeled the Senate in his proposed constitution as closely upon it as he could. This essay, too, devoted a paragraph to the Senate of Maryland, which Hamilton had already noticed with some attention in his "great" speech in the federal convention.

In Nos. 54 and 57 the mention of local circumstances, of New York state, of New York city, and of Albany county, points to the knowledge of Hamilton rather than to that of Madison.

Finally and most conclusive, in the republication in 1788 of the letters in book form, Hamilton inserted in the newspaper text of No. 56 a paragraph relating to military affairs, and as he was scrupulous, in correcting the numbers not written by himself, to limit his change to merely verbal improvements, this addition amounts to an assertion of authorship within two months of its writing. Strangely enough, in the edition of 1818 in which "the

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numbers written by Mr. Madison" were "corrected by himself," this insertion of Hamilton's was retained.

From the preceding facts, in which, so far as possible, all evidence that is of value has been included, without regard to whether it told for or against a particular man, it appears that Madison probably wrote Nos. 49 to 51, and Hamilton Nos. 52 to 58 and Nos. 62, 63, of those essays of which we find their testimony in direct contradiction. Accordingly they are in this edition assigned as above, but since the evidence cannot be termed conclusive, a question mark has been placed before the name attached to each disputed number.

But to whomever the disputed numbers are assigned, or whether they are left in doubt, the value and power of *The Federalist* were due to its undertaker, and not to his assistants. It is asserted that Hamilton requested the insertion of the sentence in the preface of the edition of 1802 to the effect that the contributions of Madison and Jay were "not unequal in merit to those which are solely from the pen of General Hamilton." In this opinion Hamilton was probably singular, for the few essays of Jay, and Madison's dry-bones on long dead confederacies, and his "theoretic" arguments, would have long since been forgotten, but for their inclusion in the essays written by Hamilton. No one who has carefully read the essays can fail to agree with George Ticknor Curtis when he asserted that "it was from [Hamilton] that *The Federalist* derived the weight and the power which commanded the careful attention of the country," and with the Hon. James Bryce, when he wrote: "Of these writers Hamilton must be deemed the leading spirit, not merely because he wrote by far the larger number of letters, but because his mind was more independent and more commanding than Madison's."

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The Federalist has been many times reprinted, and an elaborate catalogue of these editions is given in Ford's "Bibliography and Reference List of the History and

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Literature Relating to the Adoption of the Constitution of the United States, 1787–1788." Briefly, a collected edition of the newspaper articles, as revised by Hamilton, was printed in 1788, and a reissue of this was made in 1799. In 1802 a new edition with a preface by John Wells, who was slightly assisted by Hamilton, was issued, and this text was again printed in 1810 and 1817, both the latter editions adding the names of the authors from "a private memorandum" in Hamilton's "own handwriting."

In 1818 an edition, with a preface by Jacob Gideon, was printed with Madison's authority, "the numbers written by Mr. Madison corrected by himself," and with the assignment of authorship according to his views. Other editions of this text were printed in 1821, 1826, 1831, 1837, 1842, 1847, 1852, and 1857. In the edition of 1831 a brief and very inadequate index was added.

In 1863 Mr. Henry B. Dawson reprinted in collected form the original newspaper text, to which he added a learned, though biased introduction. There have been several reprints of this, but with the suppression of this introduction.

In 1864 Mr. John C. Hamilton edited an elaborate edition of Hamilton's revised text of 1788, with an introduction written from a Hamiltonian point of view; of this edition there have been several reissues.

In 1886 Mr. Henry Cabot Lodge reprinted the text of Dawson, with one or two slight modifications, and with an introduction rather favorable to Hamilton. He also included the index printed in the edition of 1831.

The present edition is designed primarily for the use of students, though it is hoped that certain new and improved features will make it the most serviceable as well for the lawyer and jurist. For the first time Hamilton's preliminary outline of *The Federalist* is included, and from the earliest edition his table of contents and his introduction, omitted in recent editions, have been added. In addition a new table of contents has been prepared, giving fuller treatment, and this has

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been repeated at the beginning of each essay to facilitate quick reference. The date of publication of each number, with the name of the newspaper in which it appeared, has been for the first time obtained and prefixed to each essay. Where, in the edition of 1788 the number was changed from the newspaper text, the latter is added, in brackets, that the endless confusion hitherto arising from this contradiction may be henceforth avoided or understood. All text of *The Federalist* which relates to the purely temporary issues of 1788, and much of the historical part, both of which are now of slight value, have been printed in smaller type. For the benefit of the student, the text has for the first time been annotated, both with a view to making obscure allusions plain, and to the elucidation of the text that intervening history has made possible.

To the text of *The Federalist* proper there have been added in the Appendix the articles of confederation and the constitution, and to the latter are appended references to the decisions of the Supreme Court bearing on each clause, with three of the most important decisions in an abridged form. All important amendments since proposed have been included in the belief that in them are best expressed the points of friction over that instrument. For this same reason are included the opinions of Hamilton and Jefferson on a national bank, the Virginia and Kentucky resolutions of 1798, the South Carolina Ordinance of Nullification and Jackson's Proclamation of 1832, the South Carolina Ordinance of Secession and Declaration of Independence, the constitution of the Confederate States, and the act creating the Electoral Commission.

Finally, for the first time *The Federalist* has been thoroughly indexed; an addition which leads the editor, from personal experience of the previous difficulty of consultation and use of the work, to believe that no book of equal importance has so needed such an improvement.

PAUL LEICESTER FORD.

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SYLLABUS OF THE FEDERALIST.[1]

A. I. A republic, a word used in various senses, has been applied to aristocracies and monarchies.

1. To Rome, under the kings.
2. To Sparta, though a Senate for life.
3. To Carthage, though the same.
4. To United Netherlands, though Stadtholder, hereditary nobles.
5. To Poland, though aristocracy and monarchy.
6. To Great Britain, though monarchy, etc.

II. Again, great confusion about words democracy, aristocracy, monarchy.

1. Democracy defined by some, Rousseau, etc., a government exercised by the collective body of the people.

a. Delegation of their power has been made the criterion of democracy.

[1] This paper has been printed in both editions of the writings of Hamilton as a "Brief of Argument on the Constitution of the United States." Study of it, however, indicates that it is a preliminary outline of *The Federalist*, from No. 39 to the end. As already mentioned in the Introduction, the beginning of the term of the New York Supreme Court compelled Hamilton to cease temporarily his work on *The Federalist* with No. 36, and he probably drew this up as a guide for Madison, who at that point assumed the task, and who closely followed in the succeeding essays the sequence here outlined. By merely transposing the last portions headed "Powers" and "Miscellaneous Advantages" so that they precede that headed "Review," we have the arrangement of ideas adopted in *The Federalist*. The syllabus is especially valuable in view of the dispute over the authorship, for it shows how sharp a line Hamilton drew between the "Powers" and the "Review" of the three departments, the latter being evidently considered by him as one synthetic whole. A comparison of No. 39 with "A" and "B" reveals how thoroughly Madison absorbed the syllabus in this number, and as that has been the most quoted of all those from Madison's pen, the source of his ideas possesses much interest.

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2. Aristocracy has been used to designate governments,
   a. Where an independent few possessed sovereignty.
   b. Where the representatives of the people possessed it.
3. Monarchy, where sovereignty is in the hands of a single man.
   ☞ General idea—Independent in his situation, in any other sense would apply to State of New York.
4. Democracy in my sense, where the whole power of the government is in the people,
   a. Whether exercised by themselves, or
   b. By their Representatives, chosen by them either mediately or immediately, and legally accountable to them.
5. Aristocracy, where whole sovereignty is permanently in the hands of a few for life or hereditary.
6. Monarchy, where the whole sovereignty is in the hands of one man for life or hereditary.
7. Mixed government, where these three principles unite.

B. I. *Consequence*, the proposed government a *representative democracy.*

1. House of Representatives directly chosen by the people for two years.
2. Senate indirectly chosen by them for six years.
3. President indirectly chosen by them for four years.
   ☞ Thus legislative and executive representatives of the people.

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4. Judicial power, representatives of the people indirectly chosen during good behavior.
5. All officers indirect choice of the people.

☞Constitution revocable and alterable by the people.

C. I. This representative democracy, as far as is consistent with its genius, has all the features of good government. These features:

1. An immediate and operative representation of the people, which is found in the House of Representatives.
2. Stability and wisdom, which is found in the Senate.
3. A vigorous executive, which is found in the President.
4. An independent judiciary, which is found in the Supreme Court, etc.

II. *b.* A separation of the essential powers of government.

Ascertain the sense of the maxim.

1. One department must not wholly possess the powers of another.
   — Montesquieu.
   — British government.

III. Departments of power must be separated, yet so as to check each other.

1. Legislative.
2. Legislative executive.
3. Judicial legislative.
4. Legislative judicial.

☞All this is done in the proposed constitution.

1. Legislative in the Congress, yet checked by negative of the Executive.
2. Executive in the President, yet checked by impeachment of Congress.

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3. Judicial check upon legislative, or interpretation of laws.
4. And checked by legislative through impeachment.

D. I. Can such a government apply to so extensive a territory?

Exaggerated ideas of extent.

N.	45	42	
S.	31	31	
	14	11	434
	973	764½	mean 868¾ by 750

Great Britain.

II. Despotic government for a large country to be examined.

REVIEW.

I. Full House of Representatives chosen every second year, etc.
II. Senate for six years by Legislatures.
Rotation every two years.
Probable increase.
III. Executive. Manner of appointment.
Compensation.
Negotiation of treaties.
Nomination of officers.
IV. Judicial power. Constitution of judges.
Extent of powers.
Inferior courts.
Trial by jury.
Criminal cases.

POWERS.

I. To provide revenue for the common defense.
II. To regulate commerce.
III. To declare war.

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IV. To raise and support armies.
V. Admission of new states.
VI. Disposal of property.

MISCELLANEOUS ADVANTAGES.

I. To prohibit importation of slaves after 1808.
II. Account to be rendered of expenditure of moneys.
III. No state shall emit bills of credit [pass no bill of at]tainder, *ex-post facto* law, or law impairing the obligation of contracts, or grant title of nobility.
IV. Definition of treason.
V. Guarantee of Republican government.

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MADISON'S ACCOUNT OF "THE FEDERALIST."

THE following memorandum complies with Mr. Paulding's request of the 16th instant.[1]

The papers under the Title of "Federalist" and signature of "publius" were written by A. H. J. M. and J. J. in the latter part of the year 1787—and the former part of the year 1788. The immediate object of them was to vindicate and recommend the new Constitution to the State of N. Y. whose ratification of the instrument, was doubtful as well as important. The undertaking was proposed by A. H. (who had probably consulted with Mr. Jay and others) to J. M. who agreed to take a part in it. The papers were originally addressed to the people of N. Y. under the signature of a "Citizen of N. Y." This was changed for that of "Publius," the first name of Valerius Publicola. A reason for the change was that one of the Writers was not a citizen of that State: another that the publication had diffused itself among most of the other States. The papers were first published at N. Y. in a Newspaper printed by Francis Childs at the rate during great part of the time at least of four numbers a week; and notwithstanding this exertion, they were not compleated till a large proportion of the States had decided on the Constitution. They were edited as soon as possible in two small vols. the preface to the 1st vol: drawn up by Mr. H bearing date N. York Mar 1788—In a publication at N. Y. in 1810 entitled

---

[1] Sent by Madison to Paulding with the following letter:

"MONTP^{R}, July 23 [1818]

"D^{R} SIR

I return your copy of Gideon's Edition of the Federalist, with the memorandum requested in your note of the 16th. I shall take a pleasure in adding any other circumstances which you may wish to know, and I may be able to communicate. . ."—EDITOR.

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"the Works of A. H" is comprized an Edition of the Fedlist in which the names of the writers are erroneously prefixed to a number of the papers. These errors are corrected in this edition by Jacob Gideon jr w assigns to the several authors of the papers their respective shares in them. J: M.

MONTPELIER July 28, 1818

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PREFACE.

IT is supposed that a collection of the papers which have made their appearance in the gazettes of this city, under the title of *The Federalist*, may not be without effect in assisting the public judgment on the momentous question of the constitution for the United States, now under the consideration of the people of America. A desire to throw full light upon so interesting a subject has led, in a great measure unavoidably, to a more copious discussion than was at first intended. And the undertaking not being yet completed, it is judged advisable to divide the collection into two volumes, of which the ensuing numbers constitute the first. The second volume will follow as speedily as the editor can get it ready for publication.

The particular circumstances under which these papers have been written, have rendered it impracticable to avoid violations of method and repetitions of ideas which cannot but displease a critical reader. The latter defect has even been intentionally indulged, in order the better to impress particular arguments which were most material to the general scope of the reasoning. Respect for public opinion, not anxiety for the literary character of the performance, dictates this remark. The great wish is that it may promote the cause of truth and lead to a right judgment of the true interests of the community.

NEW YORK, *March* 17, 1788.

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THE FEDERALIST.

No. 1. (*Independent Journal*, October 27, 1787.) Hamilton.

INTRODUCTION.

Utility of the Union—Inefficiency of confederation—Capacity of people for self-government—Opposition of state officials to new constitution—Honest differences of opinion—Political intolerance—Charges and counter charges—Publius a supporter of the proposed constitution—Outline of The Federalist—National sentiment for Union.

To the People of the State of New York:

After an unequivocal experience of the inefficiency of the subsisting federal government, you are called upon to deliberate on a new Constitution for the United States of America. The subject speaks its own importance; comprehending in its consequences nothing less than the existence of the UNION, the safety and welfare of the parts of which it is composed, the fate of an empire in many respects the most interesting in the world. It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force. If there be any truth in the remark, the crisis at which we are arrived may with propriety be regarded as the era in which that decision is to be made; and a wrong election of the part we shall act may, in this view, deserve to be considered as the general misfortune of mankind.

This idea will add the inducements of philanthropy to those of patriotism, to heighten the solicitude which

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all considerate and good men must feel for the event. Happy will it be if our choice should be directed by a judicious estimate of our true interests, unperplexed and unbiased by considerations not connected with the public good. But this is a thing more ardently to be wished than seriously to be expected. The plan offered to our deliberations affects too many particular interests, innovates upon too many local institutions, not to involve in its discussion a variety of objects foreign to its merits, and of views, passions, and prejudices little favorable to the discovery of truth.

Among the most formidable of the obstacles which the new Constitution will have to encounter may readily be distinguished the obvious interest of a certain class of men in every State to resist all changes which may hazard a diminution of the power, emolument, and consequence of the offices they hold under the State establishment;[1] and the perverted ambition of another class of men, who will either hope to aggrandize themselves by the confusions of their country, or will flatter themselves with fairer prospects of elevation from the subdivision of the empire into several partial confederacies than from its union under one government.

See No. 59

[1] No inherent objection to the constitution played so vital a part in the struggle for adoption as this opposition of what in modern parlance would be called the various state "machines." The Revolutionary War and the subsequent years of anarchy, by driving into exile or impoverishing the gentry and the commercial classes, had transferred political control in each state to the small landholders. These from the first had been strongly democratic; indeed what, to-day, would be termed populistic; and for twelve years had been favored by suspension of the courts, issues of paper money, stay- and tender-laws, and other legal devices designed to favor them and hold their support to the dominant party. This unjust favoring of one class at the expense of others the constitution promised to end, and with it, of necessity, the power of the machine leaders to retain office. With hardly an exception, therefore, those in political control were opposed to the adoption of the constitution; and that their action was based on selfishly sagacious grounds, was quickly shown by the events following the ratification of the constitution. Thus in Massachusetts, Hancock only retained the governorship by bargaining his support of the constitution in return for the Federalist promise of nomination to that office; while Samuel Adams and Elbridge Gerry

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It is not, however, my design to dwell upon observations of this nature. I am well aware that it would be disingenuous to resolve indiscriminately the opposition of any set of men (merely because their situations might subject them to suspicion) into interested or ambitious views. Candor will oblige us to admit that even such men may be actuated by upright intentions; and it cannot be doubted that much of the opposition which has made its appearance, or may hereafter make its appearance, will spring from sources, blameless, at least, if not respectable—the honest errors of minds led astray by preconceived jealousies and fears. So numerous indeed and so powerful are the causes which serve to give a false bias to the judgment, that we, upon many occasions, see wise and good men on the wrong as well as on the right side of questions of the first magnitude to society. This circumstance, if duly attended to, would furnish a lesson of moderation to those who are ever so much persuaded of their being in the right in any controversy. And a further reason for caution, in this respect, might be drawn from the reflection that we are not always sure that those who advocate the truth are influenced by purer principles than their antagonists. Ambition, avarice, personal animosity, party opposition, and many other

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were not merely defeated in their next elections, but ceased to be important political factors until the return of Democracy to power in 1801. In New York the Clinton party, after twelve years of practically uncontested power, at once began to wane, was forced to use fraudulent means to keep itself in power in 1792, and at the next election was entirely defeated. In Pennsylvania the ultra-democratic party was promptly overthrown. In Virginia Patrick Henry was driven into retirement, and the Lee faction never again exercised material political influence. In fact in every state the adoption of the federal constitution marked the prompt conversion or disappearance of certain men hitherto prominent in politics. (See Ford's "Essays on the Constitution," p. 176, and "Pennsylvania and the Federal Constitution," p. 11.) Nor did this vital influence of national on state politics end with this waning of the "Anti-federalists," the most certain methods to this day of defeating an "intrenched machine" being the injection into a state political contest of issues wholly national. Far more than half of the overturnings of state parties have come about through contests for control of the general government, and the state-dominant-party leaders of to-day dread nothing so much as a sharply fought national election.—EDITOR.

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motives not more laudable than these, are apt to operate as well upon those who support as those who oppose the right side of a question. Were there not even these inducements to moderation, nothing could be more ill-judged than that intolerant spirit which has, at all times, characterized political parties. For in politics, as in religion, it is equally absurd to aim at making proselytes by fire and sword. Heresies in either can rarely be cured by persecution.

And yet, however just these sentiments will be allowed to be, we have already sufficient indications that it will happen in this as in all former cases of great national discussion. A torrent of angry and malignant passions will be let loose. To judge from the conduct of the opposite parties, we shall be led to conclude that they will mutually hope to evince the justness of their opinions, and to increase the number of their converts by the loudness of their declamations and the bitterness of their invectives. An enlightened zeal for the energy and efficiency of government will be stigmatized as the offspring of a temper fond of despotic power and hostile to the principles of liberty. An overscrupulous jealousy of danger to the rights of the people, which is more commonly the fault of the head than of the heart, will be represented as mere pretense and artifice, the stale bait for popularity at the expense of the public good. It will be forgotten, on the one hand, that jealousy is the usual concomitant of love, and that the noble enthusiasm of liberty is apt to be infected with a spirit of narrow and illiberal distrust. On the other hand, it will be equally forgotten that the vigor of government is essential to the security of liberty; that, in the contemplation of a sound and well-informed judgment, their interest can never be separated; and that a dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people than under the forbidding appearance of zeal for the firmness and efficiency of government. History will teach us that the former has been found a much more certain road to the introduction of despotism than

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the latter, and that of those men who have overturned the liberties of republics, the greatest number have begun their career by paying an obsequious court to the people; commencing demagogues, and ending tyrants.

In the course of the preceding observations, I have had an eye, my fellow-citizens, to putting you upon your guard against all attempts, from whatever quarter, to influence your decision in a matter of the utmost moment to your welfare, by any impressions other than those which may result from the evidence of truth. You will, no doubt, at the same time have collected from the general scope of them, that they proceed from a source not unfriendly to the new Constitution. Yes, my countrymen, I own to you that, after having given it an attentive consideration, I am clearly of opinion it is your interest to adopt it. I am convinced that this is the safest course for your liberty, your dignity, and your happiness. I affect not reserves which I do not feel. I will not amuse you with an appearance of deliberation when I have decided. I frankly acknowledge to you my convictions, and I will freely lay before you the reasons on which they are founded. The consciousness of good intentions disdains ambiguity. I shall not, however, multiply professions on this head. My motives must remain in the depository of my own breast. My arguments will be open to all, and may be judged of by all. They shall at least be offered in a spirit which will not disgrace the cause of truth.

I propose, in a series of papers, to discuss the following interesting particulars:—*The utility of the UNION to your political prosperity—The insufficiency of the present Confederation to preserve that Union—The necessity of a government at least equally energetic with the one proposed, to the attainment of this object—The conformity of the proposed Constitution to the true principles of republican government—Its analogy to your own State constitution*—and lastly, *The additional security which its adoption will afford to the preservation of that species of government, to liberty, and to property.*

In the progress of this discussion I shall endeavor to

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give a satisfactory answer to all the objections which shall have made their appearance, that may seem to have any claim to your attention.

It may perhaps be thought superfluous to offer arguments to prove the utility of the UNION, a point, no doubt, deeply engraved on the hearts of the great body of the people in every State, and one which, it may be imagined, has no adversaries. But the fact is that we already hear it whispered in the private circles of those who oppose the new Constitution, that the thirteen States are of too great extent for any general system, and that we must of necessity resort to separate confederacies[1] of distinct portions of the

See Nos. 5 and 13

[1] This theory of separate confederacies, on the ground that the great territory comprised in the Union was too vast and too differently circumstanced to make a general government possible, was held by many men as a theory, who none the less were willing to attempt the experiment. The impossibility was therefore the contention of those opposed to the constitution, such as George Clinton and Patrick Henry, and there can be little doubt that time would have justified their prediction but for the changed condition created by the railroad and the telegraph. With each sectional controversy the project has reappeared, and the section that has felt aggrieved has threatened, or attempted, to form itself into a separate nation. Thus in 1803 when the navigation of the Mississippi was closed the Western states seriously planned a separation from the Union. Later, when the purchase of Louisiana had removed the Western grievance, the New England leaders endeavored to form a separate confederacy in the North. The Slave-states' Convention of 1850 threatened to form a Southern confederacy, a project realized ten years later. In each case the plea was that the sectional interests were too distinct to allow of one government, although it may be safely asserted that the sectional distinctions in the Union have been no greater than the sectional differences in each state. The logical result of secession was very well sketched by Jefferson, when in 1798 he wrote: "But if on a temporary superiority of the one party, the other is to resort to a scission of the Union, no federal government can ever exist. If to rid ourselves of the present rule of Massachusetts and Connecticut, we break the Union, will the evil stop there? Suppose the New England states alone cut off, will our nature be changed? Are we not men still to the south of that, and with all the passions of men? Immediately, we shall see a Pennsylvania and a Virginia party arise in the residuary confederacy, and the public mind will be distracted with the same party spirit. What a game, too, will the one party have in their hands, by eternally threatening the other that unless they do so and so, they will join their Northern neighbors. If we reduce our Union to Virginia and North Carolina, immediately the conflict will be established between the representatives of these two states, and they will end by breaking into their simple units."—EDITOR.

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whole.* This doctrine will, in all probability, be gradually propagated, till it has votaries enough to countenance an open avowal of it. For nothing can be more evident to those who are able to take an enlarged view of the subject than the alternative of an adoption of the new Constitution or a dismemberment of the Union. It will therefore be of use to begin by examining the advantages of that Union, the certain evils, and the probable dangers, to which every State will be exposed from its dissolution. This shall accordingly constitute the subject of my next address.

PUBLIUS.

No. 2. (*Independent Journal*, October 31, 1787.) **Jay.**

THE VALUE OF UNION.

Necessity of government—Theory of separate confederacies—Geographical and racial homogeneity of the United States—Inefficiency of the articles of confederation—The Federal Convention—Consideration of the constitution—The congress of 1774—Universal belief in the necessity of Union—Project of separate confederacies.

To the People of the State of New York:

When the people of America reflect that they are now called upon to decide a question, which, in its consequences, must prove one of the most important that ever engaged their attention, the propriety of their taking a very comprehensive, as well as a very serious, view of it, will be evident.

Nothing is more certain than the indispensable necessity of government, and it is equally undeniable that, whenever and however it is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers. It is well worthy of consideration therefore, whether it would conduce more to the interest

* The same idea, tracing the arguments to their consequences, is held out in several of the late publications against the new Constitution.—PUBLIUS.

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of the people of America that they should, to all general purposes, be one nation, under one federal government, or that they should divide themselves into separate confederacies, and give to the head of each the same kind of powers which they are advised to place in one national government.

It has until lately been a received and uncontradicted opinion that the prosperity of the people of America depended on their continuing firmly united, and the wishes, prayers, and efforts of our best and wisest citizens have been constantly directed to that object. But politicians now appear, who insist that this opinion is erroneous, and that instead of looking for safety and happiness in union, we ought to seek it in a division of the States into distinct confederacies or sovereignties. However extraordinary this new doctrine may appear, it nevertheless has its advocates; and certain characters who were much opposed to it formerly are at present of the number. Whatever may be the arguments or inducements which have wrought this change in the sentiments and declarations of these gentlemen, it certainly would not be wise in the people at large to adopt these new political tenets without being fully convinced that they are founded in truth and sound policy.

It has often given me pleasure to observe that independent America was not composed of detached and distant territories, but that one connected, fertile, wide-spreading country was the portion of our western sons of liberty. Providence has in a particular manner blessed it with a variety of soils and productions, and watered it with innumerable streams, for the delight and accommodation of its inhabitants. A succession of navigable waters forms a kind of chain round its borders, as if to bind it together; while the most noble rivers in the world, running at convenient distances, present them with highways for the easy communication of friendly aids, and the mutual transportation and exchange of their various commodities.

With equal pleasure I have so often taken notice that Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached

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to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established general liberty and independence.

This country and this people seem to have been made for each other, and it appears as if it was the design of Providence that an inheritance so proper and convenient for a band of brethren united to each other by the strongest ties, should never be split into a number of unsocial, jealous, and alien sovereignties.

Similar sentiments have hitherto prevailed among all orders and denominations of men among us. To all general purposes we have uniformly been one people; each individual citizen everywhere enjoying the same national rights, privileges, and protection. As a nation we have made peace and war; as a nation we have vanquished our common enemies; as a nation we have formed alliances, and made treaties, and entered into various compacts and conventions with foreign states.

A strong sense of the value and blessings of union induced the people, at a very early period, to institute a federal government to preserve and perpetuate it. They formed it almost as soon as they had a political existence; nay, at a time when their habitations were in flames. when many of their citizens were bleeding, and when the progress of hostility and desolation left little room for those calm and mature inquiries and reflections which must ever precede the formation of a wise and well-balanced government for a free people. It is not to be wondered at that a government, instituted in times so inauspicious, should on experiment be found greatly deficient and inadequate to the purpose it was intended to answer.

This intelligent people perceived and regretted these defects. Still continuing no less attached to union than enamored of liberty, they observed the danger which immediately threatened the former and more remotely the latter; and being persuaded that ample security for both could only be found in a national government more wisely framed, they, as with one voice, convened the late convention at Philadelphia, to take that important subject under consideration.

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This convention, composed of men who possessed the confidence of the people, and many of whom had become highly distinguished by their patriotism, virtue, and wisdom, in times which tried the minds and hearts of men, undertook the arduous task. In the mild season of peace, with minds unoccupied by other subjects, they passed many months in cool, uninterrupted, and daily consultation; and finally, without having been awed by power, or influenced by any passions except love for their country, they presented and recommended to the people the plan produced by their joint and very unanimous councils.

See No. 40.

Admit, for so is the fact, that this plan is only *recommended*, not imposed, yet let it be remembered that it is neither recommended to *blind* approbation, nor to *blind* reprobation; but to that sedate and candid consideration which the magnitude and importance of the subject demand, and which it certainly ought to receive. But this (as was remarked in the foregoing number of this paper) is more to be wished than expected, that it may be so considered and examined. Experience on a former occasion teaches us not to be too sanguine in such hopes. It is not yet forgotten that well-grounded apprehensions of imminent danger induced the people of America to form the memorable Congress of 1774. That body recommended certain measures to their constituents, and the event proved their wisdom; yet it is fresh in our memories how soon the press began to teem with pamphlets and weekly papers against those very measures. Not only many of the officers of government, who obeyed the dictates of personal interest, but others, from a mistaken estimate of consequences, or the undue influence of former attachments, or whose ambition aimed at objects which did not correspond with the public good, were indefatigable in their efforts to persuade the people to reject the advice of that patriotic Congress. Many, indeed, were deceived and deluded, but the great majority of the people reasoned and decided judiciously; and happy they are in reflecting that they did so.

They considered that the Congress was composed of many wise and experienced men. That, being convened from different parts of the country, they brought with them and communicated to each other a variety of useful information. That, in the course of the time they passed together in inquiring into and discussing the true interests of their country, they must have acquired very accurate

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knowledge on that head. That they were individually interested in the public liberty and prosperity, and therefore that it was not less their inclination than their duty to recommend only such measures as, after the most mature deliberation, they really thought prudent and advisable.

These and similar considerations then induced the people to rely greatly on the judgment and integrity of the Congress; and they took their advice, notwithstanding the various arts and endeavors used to deter them from it. But if the people at large had reason to confide in the men of that Congress, few of whom had been fully tried or generally known, still greater reason have they now to respect the judgment and advice of the convention, for it is well known that some of the most distinguished members of that Congress, who have been since tried and justly approved for patriotism and abilities, and who have grown old in acquiring political information, were also members of this convention, and carried into it their accumulated knowledge and experience.

It is worthy of remark that not only the first, but every succeeding Congress, as well as the late convention, have invariably joined with the people in thinking that the prosperity of America depended on its Union. To preserve and perpetuate it was the great object of the people in forming that convention, and it is also the great object of the plan which the convention has advised them to adopt. With what propriety, therefore, or for what good purposes, are attempts at this particular period made by some men to depreciate the importance of the Union? Or why is it suggested that three or four confederacies would be better than one? I am persuaded in my own mind that the people have always thought right on this subject, and that their universal and uniform attachment to the cause of the Union rests on great and weighty reasons, which I shall endeavor to develop and explain in some ensuing papers. They who promote the idea of substituting a number of distinct confederacies in the room of the plan of the convention, seem clearly to foresee that the rejection of it would put the continuance of the Union in the utmost jeopardy. That certainly would be the case, and I sincerely wish that it may be as clearly foreseen by every good citizen, that whenever the

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dissolution of the Union arrives, America will have reason to exclaim, in the words of the poet: "FAREWELL! A LONG FAREWELL TO ALL MY GREATNESS."

PUBLIUS.

No. 3. (*Independent Journal*, November 3, 1787.) Jay.

ADVANTAGES AND NECESSITY OF UNION IN RELATION TO FOREIGN POWERS.

Safety of public opinion—Public safety a common end—Causes of war—Treaties and commerce as causes—Efficient national government will secure services of ablest men—A supreme government necessary in construing treaties—Union a check on injustice in the States—A national government less likely to afford just causes of war—Indian wars caused by the States—Neighboring countries and consequent border wars—Advantage of national government in negotiating with foreign powers—Greater weight of the Union likely to secure better terms.

To the People of the State of New York:

It is not a new observation that the people of any country (if, like the Americans, intelligent and well-informed) seldom adopt and steadily persevere for many years in an erroneous opinion respecting their interests. That consideration naturally tends to create great respect for the high opinion which the people of America have so long and uniformly entertained of the importance of their continuing firmly united under one federal government, vested with sufficient powers for all general and national purposes.

The more attentively I consider and investigate the reasons which appear to have given birth to this opinion, the more I become convinced that they are cogent and conclusive.

Among the many objects to which a wise and free people find it necessary to direct their attention, that of providing for their *safety* seems to be the first. The *safety* of the people doubtless has relation to a great variety of circumstances and considerations, and con-

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sequently affords great latitude to those who wish to define it precisely and comprehensively.

At present I mean only to consider it as it respects security for the preservation of peace and tranquillity, as well against dangers from *foreign arms and influence*, as from dangers of the *like kind* arising from domestic causes. As the former of these comes first in order, it is proper it should be the first discussed. Let us therefore proceed to examine whether the people are not right in their opinion that a cordial Union, under an efficient national government, affords them the best security that can be devised against *hostilities* from abroad.

The number of wars which have happened or will happen in the world will always be found to be in proportion to the number and weight of the causes, whether *real* or *pretended*, which *provoke* or *invite* them. If this remark be just, it becomes useful to inquire whether so many *just* causes of war are likely to be given by *United America* as by *disunited* America; for if it should turn out that United America will probably give the fewest, then it will follow that in this respect the Union tends most to preserve the people in a state of peace with other nations.

The *just* causes of war, for the most part, arise either from violations of treaties or from direct violence. America has already formed treaties with no less than six foreign nations, and all of them, except Prussia, are maritime, and therefore able to annoy and injure us. She has also extensive commerce with Portugal, Spain, and Britain, and, with respect to the two latter, has, in addition, the circumstance of neighborhood to attend to. It is of high importance to the peace of America that she observe the laws of nations towards all these powers, and to me it appears evident that this will be more perfectly and punctually done by one national government than it could be either by thirteen separate States or by three or four distinct confederacies.

Because when once an efficient national government is established, the best men in the country will not only

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consent to serve[1] but also will generally be appointed to manage it; for, although town or country, or other contracted influence, may place men in State assemblies, or senates, or courts of justice, or executive departments, yet more general and extensive reputation for talents and other qualifications will be necessary to recommend men to offices under the national government—especially as it will have the widest field for choice, and never experience that want of proper persons which is not uncommon in some of the States. Hence, it will result that the administration, the political counsels, and the judicial decisions of the national government will be more wise, systematical, and judicious than those of individual States, and consequently more satisfactory with respect to other nations, as well as more *safe* with respect to us.

Because under the national government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense and executed in the same manner—whereas adjudications on the same points and questions, in thirteen States, or in three or four confederacies, will not always accord or be consistent; and

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[1] For the first forty years of national government, this prediction was well realized, the ablest men of both parties with scarcely an exception being persistent office-seekers and office-holders. Since 1830, however, the grade of men holding office has by no means represented the highest moral or intellectual force in the community, and those few who have won reputation in either category, have rarely been chosen because of that force, but have developed it after election. In Bryce's *American Commonwealth* (ii. 37) an interesting chapter is devoted to "Why the Best Men do not go into Politics," and doubtless each reason he brings forward has had its distinct deterrent influence, but they by no means, even in their total, explain the anomaly, for every cause he finds was as influential in 1789, or 1801, as in 1897. Other writers have urged as the explanation the development of the nominating primaries and conventions, coincident with the decline of the American statesman (Jackson's presidency, 1829–1837), but however apparently satisfactory this may appear, the introduction of these methods actually meant a bettering of conditions, for the small caucuses and conclaves they superseded were far more secret and far less to be reached by public opinion than regularly conducted primaries and conventions, accounts of which are published in the newspapers, and which have even been compelled to appear before the courts.

Thus the main reason for this lowering of the standard must be sought

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that, as well from the variety of independent courts and judges appointed by different and independent governments, as from the different local laws and interests which may affect and influence them. The wisdom of the convention, in committing such questions to the jurisdiction and judgment of courts appointed by and responsible only to one national government, cannot be too much commended.

Because the prospect of present loss or advantage may often tempt the governing party in one or two States to swerve from good faith and justice; but those temptations, not reaching the other States, and consequently having little or no influence on the national government, the temptation will be fruitless, and good faith and justice be preserved. The case of the treaty of peace with Britain adds great weight to this reasoning.

Because, even if the governing party in a State should be disposed to resist such temptations, yet, as such temptations may, and commonly do, result from circumstances peculiar to the State, and may affect a great number of the inhabitants, the governing party may not always be able, if willing, to prevent the injustice meditated, or to punish the aggressors. But the national government, not being affected by those local circumstances, will

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in some more permanent and universal causation, and the obvious influence appears to be the development of communication, which has changed the representative agent from a man acting as trustee for his community to that of a man merely voting as a proxy for his district. When President Washington was called upon to sign or veto a bill, he was compelled to act without any true knowledge of public opinion; to-day the President can scarcely avoid knowing the popular bent, and thus is always tempted to let it be a consideration in his action. In 1797 the voters of a congressional district knew practically nothing of what transpired in Congress until their representative returned from the session and reported to them; now a congressman's desk may be littered with protesting letters and telegrams from constituents the day after the mere reporting of a bill. This is in effect to make office-holders, like the members of the old French parliament, the mere registers of edicts, rather than trustees; and as men of special ability will always act independently rather than representatively, and as such ability necessarily implies separation from the average and therefore from the majority, their refusal to seek office or their exclusion from it, is a logical result.—EDITOR.

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neither be induced to commit the wrong themselves, nor want power or inclination to prevent or punish its commission by others.

So far, therefore, as either designed or accidental violations of treaties and the laws of nations afford *just* causes of war, they are less to be apprehended under one general government than under several lesser ones, and in that respect the former most favors the *safety* of the people.

As to those just causes of war which proceed from direct and unlawful violence, it appears equally clear to me that one good national government affords vastly more security against dangers of that sort than can be derived from any other quarter.

Because such violences are more frequently caused by the passions and interests of a part than of the whole; of one or two States than of the Union. Not a single Indian war has yet been occasioned by aggressions of the present federal government, feeble as it is; but there are several instances of Indian hostilities having been provoked by the improper conduct of individual States, who, either unable or unwilling to restrain or punish offenses, have given occasion to the slaughter of many innocent inhabitants.

The neighborhood of Spanish and British territories, bordering on some States and not on others, naturally confines the causes of quarrel more immediately to the borderers. The bordering States, if any, will be those who, under the impulse of sudden irritation, and a quick sense of apparent interest or injury, will be most likely, by direct violence, to excite war with these nations; and nothing can so effectually obviate that danger as a national government, whose wisdom and prudence will not be diminished by the passions which actuate the parties immediately interested.

But not only fewer just causes of war will be given by the national government, but it will also be more in their power to accommodate and settle them amicably. They will be more temperate and cool, and in that respect, as

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well as in others, will be more in capacity to act advisedly than the offending State. The pride of States, as well as of men, naturally disposes them to justify all their actions, and opposes their acknowledging, correcting, or repairing their errors and offenses. The national government, in such cases, will not be affected by this pride, but will proceed with moderation and candor to consider and decide on the means most proper to extricate them from the difficulties which threaten them.

Besides, it is well known that acknowledgments, explanations, and compensations are often accepted as satisfactory from a strong united nation, which would be rejected as unsatisfactory if offered by a State or confederacy of little consideration or power.

In the year 1685, the state of Genoa having offended Louis XIV., endeavored to appease him. He demanded that they should send their *Doge*, or chief magistrate, accompanied by four of their senators, to *France*, to ask his pardon and receive his terms. They were obliged to submit to it for the sake of peace. Would he on any occasion either have demanded or have received the like humiliation from Spain, or Britain, or any other *powerful* nation? PUBLIUS.

No. 4. (*Independent Journal*, November 7, 1787.) Jay.

RELATIONS WITH FOREIGN POWERS.

Motives of war—Rivalry with France and Britain in fisheries—Commercial rivalry with Europe—China and India trade—Rivalry with European colonies—Exclusion from Mississippi and St. Lawrence—Jealousy of Europe—Inducements to war—A single government necessary for safety—Advantages of national government—Militia and navy of Great Britain—America divided into independent governments—Attitude of foreign governments.

To the People of the State of New York:

My last paper assigned several reasons why the safety of the people would be best secured by union against the danger it may be exposed to by *just* causes of war given

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to other nations; and those reasons show that such causes would not only be more rarely given, but would also be more easily accommodated, by a national government than either by the State governments or the proposed little confederacies.

But the safety of the people of America against dangers from *foreign* force depends not only on their forbearing to give *just* causes of war to other nations, but also on their placing and continuing themselves in such a situation as not to *invite* hostility or insult; for it need not be observed that there are *pretended* as well as just causes of war.

It is too true, however disgraceful it may be to human nature, that nations in general will make war whenever they have a prospect of getting anything by it; nay, absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people. But, independent of these inducements to war, which are more prevalent in absolute monarchies, but which well deserve our attention, there are others which affect nations as often as kings; and some of them will, on examination, be found to grow out of our relative situation and circumstances.

With France and with Britain we are rivals in the fisheries, and can supply their markets cheaper than they can themselves, notwithstanding any efforts to prevent it by bounties on their own or duties on foreign fish.

With them and with most other European nations we are rivals in navigation and the carrying trade; and we shall deceive ourselves if we suppose that any of them will rejoice to see it flourish; for, as our carrying trade cannot increase without in some degree diminishing theirs, it is more their interest, and will be more their policy, to restrain than to promote it.

In the trade to China and India we interfere with more than

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one nation, inasmuch as it enables us to partake in advantages which they had in a manner monopolized, and as we thereby supply ourselves with commodities which we used to purchase from them.

The extension of our own commerce in our own vessels cannot give pleasure to any nations who possess territories on or near this continent, because the cheapness and excellence of our productions added to the circumstance of vicinity, and the enterprise and address of our merchants and navigators, will give us a greater share in the advantages which those territories afford, than consists with the wishes or policy of their respective sovereigns.

Spain thinks it convenient to shut the Mississippi[1] against us on one side, and Britain excludes us from the St. Lawrence on the other; nor will either of them permit the other waters which are between them and us to become the means of mutual intercourse and traffic.

See No. 11.

From these and such like considerations, which might, if consistent with prudence, be more amplified and detailed, it is easy to see that jealousies and uneasinesses may gradually slide into the minds and cabinets of other nations, and that we are not to expect that they should regard our advancement in union, in power, and consequence by land and by sea, with an eye of indifference and composure.

The people of America are aware that inducements to war may arise out of these circumstances, as well as from others not so obvious at present, and that whenever such inducements may find fit time and opportunity for operation, pretenses to color and justify them will not be wanting. Wisely, therefore, do they consider union and a good national government as necessary to put and keep them in *such a situation* as, instead of *inviting* war, will tend to repress and discourage it. That situation consists in the best possible state of defense, and necessarily depends on the government, the arms, and the resources of the country.

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[1] This dispute over the navigation of the Mississippi was one of the most vital questions of politics from 1783 until the purchase of Louisiana twenty years later. The earlier stages of the dispute are dealt with in W. C. Ford's "United States and Spain in 1790" (Brooklyn, 1890), and the later negotiations are given at large in Adams' "History of the United States." Once again its navigation became a question of national politics, one of the motives for resisting the secession of the South being the fear that the Northwest would be occluded from the southern part of the river and thus from a free entrance to the Gulf of Mexico, and next to the capture of the Confederate capital the control of the Mississippi formed the greatest contest of the Civil War.—EDITOR.

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As the safety of the whole is the interest of the whole, and cannot be provided for without government, either one or more or many, let us inquire whether one good government is not, relative to the object in question, more competent than any other given number whatever.

One government can collect and avail itself of the talents and experience of the ablest men, in whatever part of the Union they may be found. It can move on uniform principles of policy. It can harmonize, assimilate, and protect the several parts and members, and extend the benefit of its foresight and precautions to each. In the formation of treaties, it will regard the interest of the whole, and the particular interests of the parts as connected with that of the whole. It can apply the resources and power of the whole to the defense of any particular part, and that more easily and expeditiously than State governments or separate confederacies can possibly do, for want of concert and unity of system. It can place the militia under one plan of discipline, and, by putting their officers in a proper line of subordination to the Chief Magistrate, will, as it were, consolidate them into one corps, and thereby render them more efficient than if divided into thirteen or into three or four distinct, independent bodies.

What would the militia of Britain be if the English militia obeyed the government of England, if the Scotch militia obeyed the government of Scotland, and if the Welsh militia obeyed the government of Wales? Suppose an invasion; would those three governments (if they agreed at all) be able, with all their respective forces, to operate against the enemy so effectually as the single government of Great Britain would?

We have heard much of the fleets of Britain, and the time may come, if we are wise, when the fleets of America may engage attention. But if one national government had not so regulated the navigation of Britain as to make it a nursery for seamen—if one national government had not called forth all the national means and materials for forming fleets, their prowess and their thunder would

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never have been celebrated. Let England have its navigation and fleet—let Scotland have its navigation and fleet—let Wales have its navigation and fleet—let Ireland have its navigation and fleet—let those four of the constituent parts of the British empire be under four independent governments, and it is easy to perceive how soon they would each dwindle into comparative insignificance.

Apply these facts to our own case. Leave America divided into thirteen or, if you please, into three or four independent governments—what armies could they raise and pay—what fleets could they ever hope to have? If one was attacked, would the others fly to its succor, and spend their blood and money in its defense? Would there be no danger of their being flattered into neutrality by its specious promises, or seduced by a too great fondness for peace to decline hazarding their tranquillity and present safety for the sake of neighbors, of whom perhaps they have been jealous, and whose importance they are content to see diminished? Although such conduct would not be wise, it would, nevertheless, be natural. The history of the states of Greece, and of other countries, abounds with such instances, and it is not improbable that what has so often happened would, under similar circumstances, happen again.

But admit that they might be willing to help the invaded State or confederacy. How, and when, and in what proportion shall aids of men and money be afforded? Who shall command the allied armies, and from which of them shall he receive his orders? Who shall settle the terms of peace, and in case of disputes what umpire shall decide between them and compel acquiescence? Various difficulties and inconveniences would be inseparable from such a situation; whereas one government, watching over the general and common interests, and combining and directing the powers and resources of the whole, would be free from all these embarrassments, and conduce far more to the safety of the people.

But whatever may be our situation, whether firmly united under one national government, or split into a number of confederacies, certain it is that foreign nations will know and view it exactly as it is; and they

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will act toward us accordingly. If they see that our national government is efficient and well administered, our trade prudently regulated, our militia properly organized and disciplined, our resources and finances discreetly managed, our credit re-established, our people free, contented, and united, they will be much more disposed to cultivate our friendship than provoke our resentment. If, on the other hand, they find us either destitute of an effectual government (each State doing right or wrong, as to its rulers may seem convenient), or split into three or four independent and probably discordant republics or confederacies, one inclining to Britain, another to France, and a third to Spain, and perhaps played off against each other by the three, what a poor, pitiful figure will America make in their eyes! How liable would she become not only to their contempt, but to their outrage; and how soon would dear-bought experience proclaim that when a people or family so divide, it never fails to be against themselves.

PUBLIUS.

No. 5. (*Independent Journal*, November 10, 1787.) Jay.

PROJECT OF SEPARATE CONFEDERACIES, IN RELATION TO FOREIGN POWER.

Queen Anne's letter on union of England and Scotland—Example of Great Britain—Division of the United States—Results of separate confederacies—Inevitable jealousy—The "Northern Hive"—Similar confederacies—Folly of mere alliances and treaties—Certainty of appeals to Europe.

To the People of the State of New York:

Queen Anne, in her letter of the 1st July, 1706, to the Scotch Parliament, makes some observations on the importance of the *Union* then forming between England and Scotland, which merit our attention. I shall present the public with one or two extracts from it: "An entire and perfect union will be the solid foundation of lasting peace: It will secure your religion, liberty, and property; remove the animosities amongst yourselves, and the jealousies and

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differences betwixt our two kingdoms. It must increase your strength, riches, and trade; and by this union the whole island, being joined in affection and free from all apprehensions of different interest, will be *enabled to resist all its enemies.*" "We most earnestly recommend to you calmness and unanimity in this great and weighty affair, that the union may be brought to a happy conclusion, being the only *effectual* way to secure our present and future happiness, and disappoint the designs of our and your enemies, who will doubtless, on this occasion, *use their utmost endeavors to prevent or delay this union.*"

It was remarked in the preceding paper, that weakness and divisions at home would invite dangers from abroad; and that nothing would tend more to secure us from them than union, strength, and good government within ourselves. This subject is copious and cannot easily be exhausted.

The history of Great Britain is the one with which we are in general the best acquainted, and it gives us many useful lessons. We may profit by their experience without paying the price which it cost them. Although it seems obvious to common sense that the people of such an island should be but one nation, yet we find that they were for ages divided into three, and that those three were almost constantly embroiled in quarrels and wars with one another. Notwithstanding their true interest with respect to the continental nations was really the same, yet by the arts and policy and practices of those nations, their mutual jealousies were perpetually kept inflamed, and for a long series of years they were far more inconvenient and troublesome than they were useful and assisting to each other.

Should the people of America divide themselves into three or four nations, would not the same thing happen? Would not similar jealousies arise, and be in like manner cherished? Instead of their being "joined in affection" and free from all apprehension of different "interests," envy and jealousy would soon extinguish confidence and affection, and the partial interests of each confederacy, instead of the general interests of all America, would be the only objects of their policy and pursuits. Hence, like most other *bordering* nations, they would always be either involved in disputes and war, or live in the constant apprehension of them.[1]

[1] The results of division were well sketched in Lincoln's inaugural, when he wrote, "Physically speaking, we cannot separate. We cannot remove our respective sections from each other, nor build an impassable

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The most sanguine advocates for three or four confederacies cannot reasonably suppose that they would long remain exactly on an equal footing in point of strength, even if it was possible to form them so at first; but, admitting that to be practicable, yet what human contrivance can secure the continuance of such equality? Independent of those local circumstances which tend to beget and increase power in one part and to impede its progress in another, we must advert to the effects of that superior policy and good management which would probably distinguish the government of one above the rest, and by which their relative equality in strength and consideration would be destroyed. For it cannot be presumed that the same degree of sound policy, prudence, and foresight would uniformly be observed by each of these confederacies for a long succession of years.

Whenever, and from whatever cause, it might happen, and happen it would, that any one of these nations or confederacies should rise on the scale of political importance much above the degree of her neighbors, that moment would those neighbors behold her with envy and with fear. Both those passions would lead them to countenance, if not to promote, whatever might promise to diminish her importance; and would also restrain them from measures calculated to advance or even to secure her prosperity. Much time would not be necessary to enable her to discern these unfriendly dispositions. She would soon begin, not only to lose confidence in her neighbors, but also to feel a disposition equally unfavorable to them. Distrust naturally creates distrust, and by

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wall between them. A husband and wife may be divorced, and go out of the presence and beyond the reach of each other; but the different parts of our country cannot do this. They cannot but remain face to face; and intercourse, either amicable or hostile, must continue between them. Is it possible, then, to make that intercourse more advantageous or more satisfactory after separation than before? Can aliens make treaties easier than friends can make laws? Can treaties be more faithfully enforced between aliens than laws can among friends? Suppose you go to war, you cannot fight always; and when after much loss on both sides, and no gain on either, you cease fighting, the identical questions as to terms of intercourse are again upon you."—EDITOR.

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nothing is good-will and kind conduct more speedily changed than by invidious jealousies and uncandid imputations, whether expressed or implied.

The North is generally the region of strength, and many local circumstances render it probable that the most Northern of the proposed confederacies would, at a period not very distant, be unquestionably more formidable than any of the others. No sooner would this become evident than the *Northern Hive* would excite the same ideas and sensations in the more southern parts of America which it formerly did in the southern parts of Europe. Nor does it appear to be a rash conjecture that its young swarms might often be tempted to gather honey in the more blooming fields and milder air of their luxurious and more delicate neighbors.

They who well consider the history of similar divisions and confederacies will find abundant reason to apprehend that those in contemplation would in no other sense be neighbors than as they would be borderers; that they would neither love nor trust one another, but on the contrary would be a prey to discord, jealousy, and mutual injuries; in short, that they would place us exactly in the situations in which some nations doubtless wish to see us, viz., *formidable only to each other.*[1]

From these considerations it appears that those gentlemen are greatly mistaken who suppose that alliances offensive and defensive might be formed between these confederacies, and would produce that combination and union of wills, of arms, and of resources, which would be necessary to put and keep them in a formidable state of defense against foreign enemies.

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[1] The truth of this view was well indicated by the attitude of the country then most favorable to us, the French government writing to its American agents as follows: "I think as you do, that the preservation of the Congress would suit us, but what perhaps suits us better is that the United States should not acquire the political consistence of which they are susceptible." (To French Chargé, July 21, 1783.) "It suits France that the United States should remain in their present state, because if they should acquire the political consistence of which they are susceptible, they would soon acquire a force or a power which they would be very ready to abuse." (To Moustier, September 27, 1787.)—EDITOR.

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When did the independent states, into which Britain and Spain were formerly divided, combine in such alliance, or unite their forces against a foreign enemy? The proposed confederacies will be *distinct nations*. Each of them would have its commerce with foreigners to regulate by distinct treaties; and as their productions and commodities are different and proper for different markets, so would those treaties be essentially different. Different commercial concerns must create different interests, and of course different degrees of political attachment to and connection with different foreign nations. Hence it might and probably would happen that the foreign nation with whom the *Southern* confederacy might be at war would be the one with whom the *Northern* confederacy would be the most desirous of preserving peace and friendship. An alliance so contrary to their immediate interest would not therefore be easy to form, nor, if formed, would it be observed and fulfilled with perfect good faith.[1]

See Nos. 1 and 13.

Nay, it is far more probable that in America, as in Europe, neighboring nations, acting under the impulse of opposite interests and unfriendly passions, would frequently be found taking different sides. Considering our distance from Europe, it would be more natural for these confederacies to apprehend danger from one another than from distant nations, and therefore that each of them should be more desirous to guard against the others by aid of foreign alliances, than to guard against foreign dangers by alliances between themselves. And here let us not forget how much more easy it is to receive foreign fleets into our ports, and foreign armies into our country, than it is to persuade or compel them to depart. How many conquests did the Romans and others make

[1] The appeals of the Confederate States to Great Britain and France during the Civil War are an evidence of the truth of this, and their friendly attitude towards the South, with the sympathy for the North shown by Russia, proves how quickly European alliances and coalitions would follow upon any creation of rival confederacies on this continent.—EDITOR.

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in the characters of allies, and what innovations did they under the same character introduce into the governments of those whom they pretended to protect?

Let candid men judge, then, whether the division of America into any given number of independent sovereignties would tend to secure us against the hostilities and improper interference of foreign nations.

PUBLIUS.

No. 6. (*Independent Journal*, November 14, 1787.) Hamilton.

SEPARATE CONFEDERACIES SURE TO END IN DISSENSION BETWEEN STATES.

Certainty of interstate contests—Causes of hostility among nations—Wars produced by personal influence—Alleged pacific genius of republics—Republics as much addicted to war as monarchies—Examples of Sparta, Athens, Rome, Carthage, Venice, Holland, and Britain—As many popular as royal wars—Wars between France and England—No reason to expect cordiality between the states if separated—Vicinage constitutes nations natural enemies.

To the People of the State of New York:

The three last numbers of this paper have been dedicated to an enumeration of the dangers to which we should be exposed in a state of disunion, from the arms and arts of foreign nations. I shall now proceed to delineate dangers of a different and, perhaps, still more alarming kind—those which will in all probability flow from dissensions between the States themselves, and from domestic factions and convulsions. These have already in some instances been slightly anticipated; but they deserve a more particular and more full investigation.

A man must be far gone in Utopian speculations who can seriously doubt that if these States should either be wholly disunited, or only united in partial confederacies, the subdivisions into which they might be thrown would have frequent and violent contests with each other. To presume a want of motives for such contests as an

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argument against their existence, would be to forget that men are ambitious, vindictive, and rapacious. To look for a continuation of harmony between a number of independent, unconnected sovereignties in the same neighborhood, would be to disregard the uniform course of human events, and to set at defiance the accumulated experience of ages.

The causes of hostility among nations are innumerable. There are some which have a general and almost constant operation upon the collective bodies of society. Of this description are the love of power or the desire of pre-eminence and dominion—the jealousy of power, or the desire of equality and safety. There are others which have a more circumscribed though an equally operative influence within their spheres. Such are the rivalships and competitions of commerce between commercial nations. And there are others, not less numerous than either of the former, which take their origin entirely in private passions; in the attachments, enmities, interests, hopes, and fears of leading individuals in the communities of which they are members. Men of this class, whether the favorites of a king or of a people, have in too many instances abused the confidence they possessed; and assuming the pretext of some public motive, have not scrupled to sacrifice the national tranquillity to personal advantage or personal gratification.

The celebrated Pericles, in compliance with the resentment of a prostitute,* at the expense of much of the blood and treasure of his countrymen, attacked, vanquished, and destroyed the city of the *Samians*. The same man, stimulated by private pique against the *Megarensians*,† another nation of Greece, or to avoid a prosecution with which he was threatened as an accomplice in a supposed theft of the statuary Phidias,‡ or to get rid of the accusations prepared to be brought against him for dissipating the funds of the state in the purchase of popularity,§ or from a combination of all these causes, was the primitive author of that famous and fatal war, distinguished in the Grecian annals by the name of the *Peloponnesian* war; which, after various vicissitudes, intermis-

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* Aspasia; *vide* "Plutarch's Life of Pericles."—PUBLIUS.

† *Ibid.*—PUBLIUS.

‡ *Ibid.*—PUBLIUS.

§ *Ibid.* Phidias was supposed to have stolen some public gold, with the connivance of Pericles, for the embellishment of the statue of Minerva.—PUBLIUS.

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sions, and renewals, terminated in the ruin of the Athenian commonwealth.

The ambitious cardinal who was prime minister to Henry VIII., permitting his vanity to aspire to the triple crown,* entertained hopes of succeeding in the acquisition of that splendid prize by the influence of the Emperor Charles V. To secure the favor and interest of this enterprising and powerful monarch, he precipitated England into a war with France, contrary to the plainest dictates of policy, and at the hazard of the safety and independence, as well of the kingdom over which he presided by his counsels, as of Europe in general. For if there ever was a sovereign who bid fair to realize the project of universal monarchy, it was the Emperor Charles V., of whose intrigues Wolsey was at once the instrument and the dupe.

The influence which the bigotry of one female,† the petulance of another,‡ and the cabals of a third,§ had in the contemporary policy, ferments, and pacifications, of a considerable part of Europe, are topics that have been too often descanted upon not to be generally known.

To multiply examples of the agency of personal considerations in the production of great national events, either foreign or domestic, according to their direction, would be an unnecessary waste of time. Those who have but a superficial acquaintance with the sources from which they are to be drawn will themselves recollect a variety of instances; and those who have a tolerable knowledge of human nature will not stand in need of such lights to form their opinion either of the reality or extent of that agency. Perhaps, however, a reference tending to illustrate the general principle, may with propriety be made to a case which has lately happened among ourselves. If Shays had not been a *desperate debtor*, it is much to be doubted whether Massachusetts would have been plunged into a civil war.

See No. 6.

But notwithstanding the concurring testimony of experience in this particular, there are still to be found visionary or designing men who stand ready to advocate the paradox of perpetual peace between the States, though dismembered and alienated from each other. The genius of republics (say they) is pacific; the spirit

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* Worn by the Popes.—PUBLIUS.
† Mme. de Maintenon.—PUBLIUS.
‡ Duchess of Marlborough.—PUBLIUS.
§ Mme. de Pompadour.—PUBLIUS.

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of commerce has a tendency to soften the manners of men, and to extinguish those inflammable humors which have so often kindled into wars. Commercial republics like ours will never be disposed to waste themselves in ruinous contentions with each other. They will be governed by mutual interest, and will cultivate a spirit of mutual amity and concord.

Is it not (we may ask these projectors in politics) the true interest of all nations to cultivate the same benevolent and philosophic spirit? If this be their true interest, have they in fact pursued it? Has it not, on the contrary, invariably been found that momentary passions, and immediate interests, have a more active and imperious control over human conduct than general or remote considerations of policy, utility, or justice? Have republics in practice been less addicted to war than monarchies? Are not the former administered by *men* as well as the latter? Are there not aversions, predilections, rivalships, and desires of unjust acquisitions, that affect nations as well as kings? Are not popular assemblies frequently subject to the impulses of rage, resentment, jealousy, avarice, and of other irregular and violent propensities? Is it not well known that their determinations are often governed by a few individuals in whom they place confidence, and are, of course, liable to be tinctured by the passions and views of those individuals? Has commerce hitherto done anything more than change the objects of war? Is not the love of wealth as domineering and enterprising a passion as that of power or glory? Have there not been as many wars founded upon commercial motives since that has become the prevailing system of nations, as were before occasioned by the cupidity of territory or dominion? Has not the spirit of commerce, in many instances, administered new incentives to the appetite, both for the one and for the other? Let experience, the least fallible guide of human opinions, be appealed to for an answer to these inquiries.

Sparta, Athens, Rome, and Carthage were all republics; two of

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them, Athens and Carthage, of the commercial kind. Yet were they as often engaged in wars, offensive and defensive, as the neighboring monarchies of the same times. Sparta was little better than a well-regulated camp; and Rome was never sated of carnage and conquest.

Carthage, though a commercial republic, was the aggressor in the very war that ended in her destruction. Hannibal had carried her arms into the heart of Italy and to the gates of Rome, before Scipio, in turn, gave him an overthrow in the territories of Carthage, and made a conquest of the commonwealth.

Venice, in later times, figured more than once in wars of ambition, till, becoming an object of terror to the other Italian states, Pope Julius II. found means to accomplish that formidable league,* which gave a deadly blow to the power and pride of this haughty republic.

The provinces of Holland, till they were overwhelmed in debts and taxes, took a leading and conspicuous part in the wars of Europe. They had furious contests with England for the dominion of the sea, and were among the most persevering and most implacable of the opponents of Louis XIV.

In the government of Britain the representatives of the people compose one branch of the national legislature. Commerce has been for ages the predominant pursuit of that country. Few nations, nevertheless, have been more frequently engaged in war; and the wars in which that kingdom has been engaged have, in numerous instances, proceeded from the people.

There have been, if I may so express it, almost as many popular as royal wars. The cries of the nation and the importunities of their representatives have upon various occasions dragged their monarchs into war, or continued them in it contrary to their inclinations, and sometimes contrary to the real interests of the state. In that memorable struggle for superiority between the rival houses of *Austria* and *Bourbon*, which so long kept Europe in a flame, it is well known that the antipathies of the English against the French, seconding the ambition, or rather the avarice, of a favorite leader,† protracted the war beyond the limits marked out by sound policy, and for a considerable time in opposition to the views of the court.

The wars of these two last-mentioned nations have in a great

* The League of Cambray, comprehending the Emperor, the King of France, the King of Aragon, and most of the Italian princes and states. —PUBLIUS.

† The Duke of Marlborough.—PUBLIUS.

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measure grown out of commercial considerations—the desire of supplanting and the fear of being supplanted, either in particular branches of traffic or in the general advantages of trade and navigation.[1]

From this summary of what has taken place in other countries, whose situations have borne the nearest resemblance to our own, what reason can we have to confide in those reveries which would seduce us into an expectation of peace and cordiality between the members of the present confederacy, in a state of separation? Have we not already seen enough of the fallacy and extravagance of those idle theories which have amused us with promises of an exemption from the imperfections, weaknesses, and evils incident to society in every shape? Is it not time to awake from the deceitful dream of a golden age, and to adopt as a practical maxim for the direction of our political conduct that we, as well as the other inhabitants of the globe, are yet remote from the happy empire of perfect wisdom and perfect virtue?

Let the point of extreme depression to which our national dignity and credit have sunk, let the inconveniences felt everywhere from a lax and ill administration of government, let the revolt of a part of the State of North Carolina,[2] the late menacing disturbances

[1] In the text of the editions of 1802 and 1818, the following additional sentences occur at this point: "and sometimes even the more culpable desire of sharing in the commerce of other nations without their consent. The last war but two between Britain and Spain sprang from the attempts of the English merchants to prosecute an illicit trade with the Spanish Main. These unjustifiable practices on their part produced severities on the part of the Spaniards toward the subjects of Great Britain which were not more justifiable; because they exceeded the bounds of a just retaliation and were chargeable with inhumanity and cruelty. Many of the English who were taken on the Spanish coast were sent to dig in the mines of Potosi; and by the usual progress of a spirit of resentment, the innocent were, after a while, confounded with the guilty in indiscriminate punishment. The complaints of the merchants kindled a violent flame throughout the nation, which soon after broke out in the House of Commons, which was communicated from that body to the ministry. Letters of reprisal were granted, and a war ensued, which in its consequences overthrew all the alliances that but twenty years before had been formed with sanguine expectations of the most beneficial fruits." —EDITOR.

[2] See Ramsay's "Annals of Tennessee," Charleston, 1853.—EDITOR.

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in Pennsylvania,[1] and the actual insurrections and rebellions in Massachusetts,[2] declare——!

So far is the general sense of mankind from corresponding with the tenets of those who endeavor to lull asleep our apprehensions of discord and hostility between the States, in the event of disunion, that it has from long observation of the progress of society become a sort of axiom in politics, that vicinity, or nearness of situation, constitutes nations natural enemies. An intelligent writer expresses himself on this subject to this effect: "NEIGHBORING NATIONS [says he] are naturally enemies of each other, unless their common weakness forces them to league in a CONFEDERATIVE REPUBLIC, and their constitution prevents the differences that neighborhood occasions, extinguishing that secret jealousy which disposes all states to aggrandize themselves at the expense of their neighbors." * This passage, at the same time, points out the EVIL and suggests the REMEDY.

PUBLIUS.

No. 7. (*Independent Journal*, November 17, 1787.) Hamilton.

CAUSES FOR DISSENSIONS BETWEEN STATES IF SEPARATED.

Territorial disputes—Public territory—Wyoming controversy—Vermont dispute—Competitions of commerce—Discriminating commercial regulations—The New York impost—The national debt—Difficulties of apportioning debt—Laws in violation of private contracts—Example of Rhode Island—Domestic and foreign alliances—Certainty of European entanglements.

To the People of the State of New York:

It is sometimes asked with an air of seeming triumph what inducements could the States have, if disunited, to make war upon each other? It would be a full answer

* *Vide* "Principes des Négociations," par l'Abbé de Mably.—PUBLIUS.

[1] See Hoyt's "Brief of a Title in the Seventeen Townships of the county of Luzerne" (with bibliography); Harrisburg, 1879.—EDITOR.

[2] A full history of Shays' rebellion will be found in Minot's "History of the Insurrections in Massachusetts"; Worcester, 1787.—EDITOR.

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to this question to say—precisely the same inducements which have, at different times, deluged in blood all the nations in the world. But unfortunately for us, the question admits of a more particular answer. There are causes of differences within our immediate contemplation, of the tendency of which, even under the restraints of a federal constitution, we have had sufficient experience to enable us to form a judgment of what might be expected if those restraints were removed.

Territorial disputes have at all times been found one of the most fertile sources of hostility among nations.[1] Perhaps the greatest proportion of wars that have desolated the earth have sprung from this origin. This cause would exist among us in full force. We have a vast tract of unsettled territory within the boundaries of the United States. There still are discordant and undecided claims between several of them, and the dissolution of the Union would lay a foundation for similar claims between them all. It is well known that they have heretofore had serious and animated discussion concerning the rights to the lands which were ungranted at the time of the Revolution, and which usually went under the name of crown lands. The States within the limits of whose colonial governments they were comprised have claimed them as their property, the others have contended that the rights of the crown in this article devolved upon the Union; especially as to all that part of the Western territory which, either by actual possession, or through the submission of the Indian proprietors, was subjected to the jurisdiction of the King of Great Britain, till it was

See No. 38.

[1] To discuss here the long struggle over the public territory, beginning long prior to the Revolution and continued until the end of the Civil War, which was in truth, aside from temporary and local disagreements, but a struggle of the various sections of the Union to maintain a balance of interest between the North and South, or East and West, would require far too much space. An outline history is brilliantly given in Welling's "The Land Politics of the United States," New York, 1888; at greater length in Sato's "History of the Land Question in the United States" (Baltimore, 1886), and much material in relation to the land problems is to be found in Donaldson's "The Public Domain" (Washington, 1884).—EDITOR.

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relinquished in the treaty of peace. This, it has been said, was at all events an acquisition to the Confederacy by compact with a foreign power. It has been the prudent policy of Congress to appease this controversy, by prevailing upon the States to make cessions to the United States for the benefit of the whole. This has been so far accomplished as, under a continuation of the Union, to afford a decided prospect of an amicable termination of the dispute. A dismemberment of the Confederacy, however, would revive this dispute, and would create others on the same subject. At present a large part of the vacant Western territory is by cession at least, if not by any anterior right, the common property of the Union. If that were at an end, the States which made the cession on a principle of federal compromise, would be apt when the motive of the grant had ceased, to reclaim the lands as a reversion. The other States would no doubt insist on a proportion, by right of representation. Their argument would be that a grant once made could not be revoked; and that the justice of participating in territory acquired or secured by the joint efforts of the Confederacy, remained undiminished. If, contrary to probability, it should be admitted by all the States, that each had a right to a share of this common stock, there would still be a difficulty to be surmounted as to a proper rule of apportionment. Different principles would be set up by different States for this purpose; and as they would affect the opposite interests of the parties, they might not easily be susceptible of a pacific adjustment.

In the wide field of Western territory, therefore, we perceive an ample theater for hostile pretensions, without any umpire or common judge to interpose between the contending parties. To reason from the past to the future, we shall have good ground to apprehend that the sword would sometimes be appealed to as the arbiter of their differences. The circumstances of the dispute between Connecticut and Pennsylvania, respecting the land at Wyoming, admonish us not to be sanguine in expecting an easy accommodation of such differences. The articles of confederation obliged the parties to submit the matter to the decision of a federal

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court. The submission was made, and the court decided in favor of Pennsylvania. But Connecticut gave strong indications of dissatisfaction with that determination; nor did she appear to be entirely resigned to it, till, by negotiation and management, something like an equivalent was found for the loss she supposed herself to have sustained. Nothing here said is intended to convey the slightest censure on the conduct of that State. She no doubt sincerely believed herself to have been injured by the decision; and States, like individuals, acquiesce with great reluctance in determinations to their disadvantage.

Those who had an opportunity of seeing the inside of the transactions which attended the progress of the controversy between this State and the district of Vermont, can vouch the opposition we experienced, as well from States not interested as from those which were interested in the claim; and can attest the danger to which the peace of the Confederacy might have been exposed, had this State attempted to assert its rights by force. Two motives preponderated in that opposition: one, a jealousy entertained of our future power; and the other, the interest of certain individuals of influence in the neighboring States, who had obtained grants of lands under the actual government of that district. Even the States which brought forward claims, in contradiction to ours, seemed more solicitous to dismember this State than to establish their own pretensions. These were New Hampshire, Massachusetts, and Connecticut. New Jersey and Rhode Island, upon all occasions, discovered a warm zeal for the independence of Vermont; and Maryland, till alarmed by the appearance of a connection between Canada and that State, entered deeply into the same views. These being small States, saw with an unfriendly eye the perspective of our growing greatness. In a review of these transactions we may trace some of the causes which would be likely to embroil the States with each other, if it should be their unpropitious destiny to become disunited.

The competitions of commerce would be another fruitful source of contention. The States less favorably circumstanced would be desirous of escaping from the disadvantages of local situation, and of sharing in the advantages of their more fortunate neighbors. Each State, or separate confederacy, would pursue a system of commercial policy peculiar to itself. This would occasion distinctions, preferences, and exclusions, which would beget discontent. The habits of intercourse, on

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the basis of equal privileges, to which we have been accustomed since the earliest settlement of the country, would give a keener edge to those causes of discontent than they would naturally have independent of this circumstance. *We should be ready to denominate injuries those things which were in reality the justifiable acts of independent sovereignties consulting a distinct interest.* The spirit of enterprise, which characterizes the commercial part of America, has left no occasion of displaying itself unimproved. It is not at all probable that this unbridled spirit would pay much respect to those regulations of trade by which particular States might endeavor to secure exclusive benefits to their own citizens. The infractions of these regulations, on one side, the efforts to prevent and repel them, on the other, would naturally lead to outrages, and these to reprisals and wars.

The opportunities which some States would have of rendering others tributary to them by commercial regulations would be impatiently submitted to by the tributary States. The relative situation of New York, Connecticut, and New Jersey, would afford an example of this kind. New York, from the necessities of revenue, must lay duties on her importations. A great part of these duties must be paid by the inhabitants of the two other States in the capacity of consumers of what we import. New York would neither be willing nor able to forego this advantage. Her citizens would not consent that a duty paid by them should be remitted in favor of the citizens of her neighbors; nor would it be practicable, if there were not this impediment in the way, to distinguish the customers in our own markets. Would Connecticut and New Jersey long submit to be taxed by New York for her exclusive benefit? Should we be long permitted to remain in the quiet and undisturbed enjoyment of a metropolis, from the possession of which we derived an advantage so odious to our neighbors, and, in their opinion, so oppressive? Should we be able to preserve it against the incumbent weight of Connecticut on the one side, and the co-operating pressure of New Jersey on the other? These are questions that temerity alone will answer in the affirmative.[1]

See No. 22.

[1] A large part of the European goods consumed in the northern part of New Jersey, and of the western parts of Connecticut and Massachusetts, were imported by New York merchants and thus paid the duties levied

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The public debt of the Union would be a further cause of collision between the separate States or confederacies. The apportionment, in the first instance, and the progressive extinguishment afterward, would be alike productive of ill-humor and animosity. How would it be possible to agree upon a rule of apportionment satisfactory to all? There is scarcely any that can be proposed which is entirely free from real objections. These, as usual, would be exaggerated by the adverse interest of the parties. There are even dissimilar views among the States as to the general principle of discharging the public debt. Some of them, either less impressed with the importance of national credit, or because their citizens have little, if any, immediate interest in the question, feel an indifference, if not a repugnance, to the payment of the domestic debt at any rate. These would be inclined to magnify the difficulties of a distribution. Others of them, a numerous body of whose citizens are creditors to the public beyond the proportion of the State in the total amount of the national debt, would be strenuous for some equitable and effective provision. The procrastinations of the former would excite the resentments of the latter. The settlement of a rule would, in the meantime, be postponed by real differences of opinion

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by the state of New York. As a result it was alleged that New York drew into its public purse from Connecticut alone a yearly sum variously estimated at between $100,000 and $200,000. In the same manner Newport levied a "tribute" on the eastern part of Connecticut. Both New Jersey and Connecticut, therefore, were warmly Federal, and were among the first to adopt the constitution, while the States of New York and Rhode Island were correspondingly strongly Anti-federal. New York was finally forced into ratification by the threat of her commercial classes that rather than forego the benefits of this trade, certain to be affected by federal duties, they would make New York city a separate state and then join the Union; and Rhode Island only assented when the passing of a federal revenue bill insured her loss of the trade of Connecticut. In the same manner every tariff bill that has markedly taxed one part of the country for the benefit of another has always stirred up sectional ill-feeling (the most notable instance being the attempt of South Carolina to nullify the tariff of 1828), and became such a source of discontent to the Southern States as to result in an insertion, in the constitution of the Southern Confederacy, of a prohibition of all protective taxes on imports.—EDITOR.

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and affected delays. The citizens of the States interested would clamor; foreign powers would urge for the satisfaction of their just demands, and the peace of the States would be hazarded to the double contingency of external invasion and internal contention.

Suppose the difficulties of agreeing upon a rule surmounted, and the apportionment made. Still there is great room to suppose that the rule agreed upon would, upon experiment, be found to bear harder upon some States than upon others. Those which were sufferers by it would naturally seek for a mitigation of the burden. The others would as naturally be disinclined to a revision, which was likely to end in an increase of their own incumbrances. Their refusal would be too plausible a pretext to the complaining States to withhold their contributions, not to be embraced with avidity; and the non-compliance of these States with their engagements would be a ground of bitter discussion and altercation. If even the rule adopted should in practice justify the equality of its principle, still delinquencies in payments on the part of some of the States would result from a diversity of other causes—the real deficiency of resources; the mismanagement of their finances; accidental disorders in the management of the government; and, in addition to the rest, the reluctance with which men commonly part with money for purposes that have outlived the exigencies which produced them, and interfere with the supply of immediate wants. Delinquencies, from whatever causes, would be productive of complaints, recriminations, and quarrels. There is, perhaps, nothing more likely to disturb the tranquillity of nations than their being bound to mutual contributions for any common object that does not yield an equal and coincident benefit. For it is an observation, as true as it is trite, that there is nothing men differ so readily about as the payment of money.

Laws in violation of private contracts, as they amount to aggressions on the rights of those States whose citizens are injured by them, may be considered as another

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probable source of hostility. We are not authorized to expect that a more liberal or more equitable spirit would preside over the legislations of the individual States hereafter, if unrestrained by any additional checks, than we have heretofore seen in too many instances disgracing their several codes. We have observed the disposition to retaliation excited in Connecticut, in consequence of the enormities perpetrated by the Legislature of Rhode Island;[1] and we reasonably infer that, in similar cases under other circumstances, a war, not of *parchment*, but of the sword, would chastise such atrocious breaches of moral obligation and social justice.

The probability of incompatible alliances between the different States or confederacies and different foreign nations, and the effects of this situation upon the peace of the whole, have been sufficiently unfolded in some preceding papers. From the view they have exhibited of this part of the subject, this conclusion is to be drawn, that America, if not connected at all, or only by the feeble tie of a simple league, offensive and defensive, would, by the operation of such jarring alliances, be gradually entangled in all the pernicious labyrinths of European politics and wars; and by the destructive contentions of the parts into which she was divided, would be likely to become a prey to the artifices and machinations of powers equally the enemies of them all. *Divide et impera* * must be the motto of every nation that either hates or fears us. † PUBLIUS.

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* Divide and command.—PUBLIUS.

† In order that the whole subject of these papers may as soon as possible be laid before the public, it is proposed to publish them four times a week—on Tuesday in the New York *Packet* and on Thursday in the *Daily Advertiser*.—PUBLIUS.

[1] Rhode Island, by issues of paper money and tender laws of unusual depravity, had enacted practical public and private repudiation (see Case of *Trevett vs. Weeden*, Providence, 1787, and Potter's "Account of the Paper Money of Rhode Island," Providence, 1880), and in retaliation Connecticut passed a law forbidding its courts to try cases of Rhode Island creditors against Connecticut debtors.—EDITOR.

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No. 8. (New York *Packet*, November 20, 1787.) **Hamilton.**

CONSEQUENCES OF HOSTILITIES BETWEEN STATES.

War between the states particularly distressing—Lack of standing armies and fortified posts—Necessary introduction of standing armies—Competition between the states in armaments—Examples of Greek republics—National danger unduly magnifies military power at expense of civil—Example and peculiar felicity of Great Britain—Similiarity of the United States—Needlessness of extensive military establishments.

To the People of the State of New York:

Assuming it therefore as an established truth that the several States in case of disunion, or such combinations of them as might happen to be formed out of the wreck of the general Confederacy, would be subject to those vicissitudes of peace and war, of friendship and enmity with each other, which have fallen to the lot of all neighboring nations not united under one government, let us enter into a concise detail of some of the consequences that would attend such a situation.

War between States, in the first period of their separate existence, would be accompanied with much greater distresses than it commonly is in those countries where regular military establishments have long obtained. The disciplined armies always kept on foot on the continent of Europe, though they bear a malignant aspect to liberty and economy, have, notwithstanding, been productive of the signal advantage of rendering sudden conquests impracticable, and of preventing that rapid desolation which used to mark the progress of war prior to their introduction. The art of fortification has contributed to the same ends. The nations of Europe are encircled with chains of fortified places, which mutually obstruct invasion. Campaigns are wasted in reducing two or three frontier garrisons, to gain admittance into an enemy's country. Similar impediments occur at every step, to exhaust the strength and delay the progress of an invader.

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Formerly, an invading army would penetrate into the heart of a neighboring country almost as soon as intelligence of its approach could be received; but now a comparatively small force of disciplined troops, acting on the defensive, with the aid of posts, is able to impede and finally to frustrate the enterprises of one much more considerable. The history of war, in that quarter of the globe, is no longer a history of nations subdued and empires overturned, but of towns taken and retaken; of battles that decide nothing; of retreats more beneficial than victories; of much effort and little acquisition.

In this country the scene would be altogether reversed. The jealousy of military establishments would postpone them as long as possible. The want of fortifications, leaving the frontiers of one State open to another, would facilitate inroads. The populous States would, with little difficulty, overrun their less populous neighbors. Conquests would be as easy to be made as difficult to be retained. War, therefore, would be desultory and predatory. PLUNDER and devastation ever march in the train of irregulars. The calamities of individuals would make the principal figure in the events which would characterize our military exploits.

This picture is not too highly wrought; though, I confess, it would not long remain a just one. Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they at length become willing to run the risk of being less free.[1]

[1] The present armaments of Europe are a pointed instance of the truth of this idea, and it is to be noted that every addition to them is brought about, not through any increased probability of war, but entirely through mutual emulation. The truth can also be proved negatively by the fact

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The institutions chiefly alluded to are STANDING ARMIES and the correspondent appendages of military establishments. Standing armies, it is said, are not provided against in the new Constitution; and it is therefore inferred that they may exist under it.* Their existence, however, from the very terms of the proposition, is, at most, problematical and uncertain.[1] But standing armies, it may be replied, must inevitably result from a dissolution of the Confederacy. Frequent war and constant apprehension, which require a state of as constant preparation, will infallibly produce them. The weaker States or confederacies would first have recourse to them, to put themselves upon an equality with their more potent neighbors. They would endeavor to supply the inferiority of population and resources by a more regular and effective system of defense, by disciplined troops, and by fortifications. They would, at the same time, be necessitated to strengthen the executive arm of government, in doing which their constitutions would acquire a progressive direction toward monarchy. It is of the nature of war to increase the executive at the expense of the legislative authority.

See Nos. 24, 25, 29, 41, 64, 74.

The expedients which have been mentioned would soon give the States or confederacies that made use of them a superiority over their neighbors. Small states, or states of less natural strength,

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that the United States army in 1795, when we were menaced by strong unfriendly governments possessing Canada and Louisiana, was nearly 3500, or approximately one soldier to every 1300 of inhabitants, while in 1896, with peace with Canada an almost certain factor, and with the substitution of a weak power on our southern frontier, our army numbered but 25,000, or approximately one to every 2800 of inhabitants. And that this decrease of ratio is not merely due to our transatlantic position is shown by the armies of the republics to the south of us, where domestic and foreign peace are far less secure. Thus Mexico felt called upon to maintain (1896) an army of over 50,000 men actually serving, with more than double that number in her effective reserve, and Brazil (1896) had an army of nearly 25,000 men with a reserve of equal size. Nothing can better prove that the standing armies of to-day are in no sense the result of particular forms of government, but are merely the sacrifice of a given amount of manhood and money by each country, in absolute ratio to the interior and exterior dangers with which each is threatened, in order that life, property, and commerce, may have their necessary security.—EDITOR.

* This objection will be fully examined in its proper place, and it will be shown that the only natural precaution which could have been taken on this subject has been taken; and a much better one than is to be found in any constitution that has been heretofore framed in America, most of which contain no guard at all on this subject.—PUBLIUS.

[1] In the text of 1802: "This inference, from the very form of the proposition, is, at best, problematical and uncertain."—EDITOR.

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under vigorous governments, and with the assistance of disciplined armies, have often triumphed over large states, or states of greater natural strength, which have been destitute of these advantages. Neither the pride nor the safety of the more important States or confederacies would permit them long to submit to this mortifying and adventitious superiority. They would quickly resort to means similar to those by which it had been effected, to reinstate themselves in their lost pre-eminence. Thus we should, in a little time, see established in every part of this country the same engines of despotism which have been the scourge of the Old World. This at least, would be the natural course of things; and our reasonings will be the more likely to be just, in proportion as they are accommodated to this standard.

These are not vague inferences drawn from supposed or speculative defects in a Constitution the whole power of which is lodged in the hands of a people, or their representatives and delegates, but they are solid conclusions drawn from the natural and necessary progress of human affairs.

It may perhaps be asked by way of objection to this, why did not standing armies spring up out of the contentions which so often distracted the ancient republics of Greece? Different answers, equally satisfactory, may be given to this question. The industrious habits of the people of the present day, absorbed in the pursuits of gain, and devoted to the improvements of agriculture and commerce, are incompatible with the condition of a nation of soldiers, which was the true condition of the people of those republics. The means of revenue which have been so greatly multiplied by the increase of gold and silver and of the arts of industry, and the science of finance, which is the offspring of modern times, concurring with the habits of nations, have produced an entire revolution in the system of war, and have rendered disciplined armies, distinct from the body of the citizens, the inseparable companions of frequent hostility.

There is a wide difference, also, between military establishments in a country seldom exposed by its situation to internal invasions, and in one which is often subject to them, and always apprehensive of them. The rulers of the former can have no good pretext, if they are ever so inclined, to keep on foot armies so numerous as must of necessity be maintained in the latter. These armies being in the first case, rarely, if at all, called into activity for interior defense, the people are in no danger of being

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broken to military subordination. The laws are not accustomed to relaxations in favor of military exigencies; the civil state remains in full vigor, neither corrupted nor confounded with the principles or propensities of the other state. The smallness of the army renders the natural strength of the community an overmatch for it; and the citizens, not habituated to look up to the military power for protection, or to submit to its oppressions, neither love nor fear the soldiery; they view them with a spirit of jealous acquiescence in a necessary evil, and stand ready to resist a power which they suppose may be exerted to the prejudice of their rights. The army under such circumstances may usefully aid the magistrate to suppress a small faction, or an occasional mob, or insurrection; but it will be unable to enforce encroachments against the united efforts of the great body of the people.

In a country in the predicament last described, the contrary of all this happens. The perpetual menacings of danger oblige the government to be always prepared to repel it; its armies must be numerous enough for instant defense. The continual necessity for their services enhances the importance of the soldier, and proportionably degrades the condition of the citizen.[1] The military state becomes elevated above the civil. The inhabitants of territories often the theater of war are unavoidably subjected to frequent infringements on their rights, which serve to weaken their sense of those rights; and by degrees the people are brought to consider the soldiery not only as their protectors, but as their superiors. The transition from this disposition to that of considering them masters is neither remote nor difficult; but it is very difficult to prevail upon a people under such impressions to make a bold or effectual resistance to usurpations, supported by the military power.

[1] The relation of the soldier to the citizen in Germany at present is a striking proof of this theory.—EDITOR.

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The kingdom of Great Britain falls within the first description. An insular situation, and a powerful marine, guarding it in a great measure against the possibility of foreign invasion, supersede the necessity of a numerous army within the kingdom. A sufficient force to make head against a sudden descent, till the militia could have time to rally and embody, is all that has been deemed requisite. No motive of national policy has demanded, nor would public opinion have tolerated, a larger number of troops upon its domestic establishments. There has been for a long time past little room for the operation of the other causes which have been enumerated as the consequences of internal war. This peculiar felicity of situation has, in a great degree, contributed to preserve the liberty which that country to this day enjoys, in spite of the prevalent venality and corruption. If, on the contrary, Britain had been situated on the continent, and had been compelled, as she would have been, by that situation, to make her military establishments at home coextensive with those of the other great powers of Europe, she, like them, would in all probability be, at this day, a victim to the absolute power of a single man. 'Tis possible, though not easy, that the people of that island may be enslaved from other causes; but it cannot be by the prowess of an army so inconsiderable as that which has been usually kept up within the kingdom.

If we are wise enough to preserve the Union we may for ages enjoy an advantage similar to that of an insulated situation. Europe is at a great distance from us. Her colonies in our vicinity will be likely to continue too much disproportioned in strengh to be able to give us any dangerous annoyance. Extensive military establishments cannot, in this position, be necessary to our security. But if we should be disunited, and the integral parts should either remain separated, or, which is most probable, should be thrown together into two or three confederacies, we should be, in a short course of time, in the predicament of the continental powers of Europe—our liberties would be a prey to the means of defending ourselves against the ambition and jealousy of each other.

This is an idea not superficial or futile, but solid and weighty. It deserves the most serious and mature consideration of every prudent and honest man of whatever

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party. If such men will make a firm and solemn pause, and meditate dispassionately on the importance of this interesting idea; if they will contemplate it in all its attitudes, and trace it to all its consequences, they will not hesitate to part with trivial objections to a Constitution the rejection of which would in all probability put a final period to the Union. The airy phantoms that flit before the distempered imaginations of some of its adversaries would quickly give place to the more substantial forms of dangers, real, certain, and formidable.

PUBLIUS.

No. 9. (*Independent Journal*, November 21, 1787.) Hamilton.

THE UNION A SAFEGUARD AGAINST DOMESTIC DISTURBANCES.

Example of Greek and Italian republics—Arguments against republican government and civil liberty—Improvements in the art of government—Advantages of extended territory—Opinion of Montesquieu—Necessity for subdivision implied in Montesquieu's view—Federalization an expedient for the extension of government—Quotation from Montesquieu—Inaccurate distinction between confederation and consolidation—Definition of a confederate republic—Federal character of proposed constitution—Lycian confederacy.

To the People of the State of New York:

A firm Union will be of the utmost moment to the peace and liberty of the States, as a barrier against domestic faction and insurrection. It is impossible to read the history of the petty republics of Greece and Italy without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of revolutions by which they were kept in a state of perpetual vibration between the extremes of tyranny and anarchy. If they exhibit occasional calms, these only serve as short-lived contrasts to the furious storms that are to succeed. If now and then

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intervals of felicity open to view, we behold them with a mixture of regret arising from the reflection that the pleasing scenes before us are soon to be overwhelmed by the tempestuous waves of sedition and party rage. If momentary rays of glory break forth from the gloom, while they dazzle us with a transient and fleeting brilliancy, they at the same time admonish us to lament that the vices of government should pervert the direction and tarnish the luster of those bright talents and exalted endowments for which the favored soils that produced them have been so justly celebrated.

From the disorders that disfigure the annals of those republics the advocates of depotism have drawn arguments, not only against the forms of republican government, but against the very principles of civil liberty. They have decried all free government as inconsistent with the order of society, and have indulged themselves in malicious exultation over its friends and partisans. Happily for mankind, stupendous fabrics reared on the basis of liberty, which have flourished for ages, have, in a few glorious instances, refuted their gloomy sophisms. And, I trust, America will be the broad and solid foundation of other edifices, not less magnificent, which will be equally permanent monuments of their errors.

But it is not to be denied that the portraits they have sketched of republican government were too just copies of the originals from which they were taken. If it had been found impracticable to have devised models of a more perfect structure, the enlightened friends to liberty would have been obliged to abandon the cause of that species of government as indefensible. The science of politics, however, like most other sciences, has received great improvement. The efficacy of various principles is now well understood, which were either not known at all, or imperfectly known to the ancients. The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior; the representation of the people in the legislature by deputies of their own election: these are wholly new discoveries, or have made their principal progress

See No. 47.

See Nos. 58-61.

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towards perfection in modern times. They are means, and powerful means by which the excellences of republican government may be retained and its imperfections lessened or avoided. To this catalogue of circumstances that tend to the amelioration of popular systems of civil government, I shall venture, however novel it may appear to some, to add one more, on a principle which has been made the foundation of an objection to the new Constitution; I mean the ENLARGEMENT of the ORBIT within which such systems are to revolve, either in respect to the dimensions of a single State, or to the consolidation of several smaller States into one great Confederacy. The latter is that which immediately concerns the object under consideration. It will, however, be of use to examine the principle in its application to a single State, which shall be attended to in another place.

See Nos. 10 and 14.

The utility of a Confederacy, as well to suppress faction and to guard the internal tranquillity of States, as to increase their external force and security, is in reality not a new idea. It has been practiced upon in different countries and ages, and has received the sanction of the most approved writers on the subjects of politics. The opponents of the plan proposed have, with great assiduity, cited and circulated the observations of Montesquieu on the necessity of a contracted territory for a republican government.[1] But they seem not to have been apprised

[1] This undoubtedly was designed as a reply to an extract from Montesquieu in the third letter of Cato (George Clinton) published in the New York *Journal*, October 25, 1787 (Ford's "Essays on the Constitution," p. 256) where Montesquieu is quoted as saying, "It is natural to a republic to have only a small territory, otherwise it cannot long subsist; in a large one, there are men of large fortunes, and consequently of less moderation; there are too great deposits to trust in the hands of a single subject; an ambitious person soon becomes sensible that he may be happy, great, and glorious by oppressing his fellow-citizens, and that he might raise himself to grandeur, on the ruins of his country. In large republics, the public good is sacrificed to a thousand views; in a small one, the interest of the public is easily perceived, better understood, and more within the reach of every citizen; abuses have a less extent, and of course are less protected—he also shows you, that the duration of the republic of Sparta was owing to its having continued with the same ex-

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of the sentiments of that great man expressed in another part of his work, nor to have adverted to the consequences of the principle to which they subscribe with such ready acquiescence.

When Montesquieu recommends a small extent for republics, the standards he had in view were of dimensions far short of the limits of almost every one of these States. Neither Virginia, Massachusetts, Pennsylvania, New York, North Carolina, nor Georgia can by any means be compared with the models from which he reasoned and to which the terms of his description apply. If we therefore take his ideas on this point as the criterion of truth, we shall be driven to the alternative either of taking refuge at once in the arms of monarchy, or of splitting ourselves into an infinity of little jealous, clashing, tumultuous commonwealths, the wretched nurseries of unceasing discord, and the miserable objects of universal pity or contempt. Some of the writers who have come forward on the other side of the question seem to have been aware of the dilemma; and have even been bold enough to hint at the division of the larger States as a desirable thing. Such an infatuated policy, such a desperate expedient, might, by the multiplication of petty offices, answer the views of men who possess not qualifications to extend their influence beyond the narrow circles of personal intrigue, but it could never promote the greatness or happiness of the people of America.

Referring the examination of the principle itself to

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tent of territory after all its wars; and that the ambition of Athens and Lacedæmon to command and direct the union, lost them their liberties and gave them a monarchy." Though the last hundred years has made any discussion of the theory unnecessary, yet it is interesting to cite an opinion of Jefferson's, written immediately after the triumph of democracy in 1801, when he wrote, "It furnishes a new proof of the falsehood of Montesquieu's doctrine, that a republic can be preserved only in a small territory. The reverse is the truth. Had our territory been even a third only of what it is, we were gone. But while frenzy and delusion, like an epidemic, gained certain parts, the residue remained sound and untouched, and held on till their brethren could recover from the temporary delusion; and that circumstance has given me great comfort." —EDITOR.

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ma[illegible]her place, as has been already mentioned, it will be tio[illegible]cient to remark here that, in the sense of the author by [illegible] has been most emphatically quoted upon the occasion, it would only dictate a reduction of the SIZE of the more considerable MEMBERS of the Union, but would not militate against their being all comprehended in one confederate government. And this is the true question, in the discussion of which we are at present interested.

So far are the suggestions of Montesquieu from standing in opposition to a general Union of the States, that he explicitly treats of a CONFEDERATE REPUBLIC as the expedient for extending the sphere of popular government, and reconciling the advantages of monarchy with those of republicanism.

"It is very probable" (says he*), "that mankind would have been obliged at length to live constantly under the government of a single person, had they not contrived a kind of constitution that has all the internal advantages of a republican, together with the external force of a monarchical government. I mean a CONFEDERATE REPUBLIC.

"This form of government is a convention by which several smaller *states* agree to become members of a larger *one*, which they intend to form. It is a kind of assemblage of societies that constitute a new one, capable of increasing, by means of new associations, till they arrive to such a degree of power as to be able to provide for the security of the united body.

"A republic of this kind, able to withstand an external force, may support itself without any internal corruptions. The form of this society prevents all manner of inconveniences.

"If a single member should attempt to usurp the supreme authority, he could not be supposed to have an equal authority and credit in all the confederate states. Were he to have too great influence over one, this would alarm the rest. Were he to subdue a part, that which would still remain free might oppose him with forces independent of those which he had usurped, and overpower him before he could be settled in his usurpation.

"Should a popular insurrection happen in one of the confederate states, the others are able to quell it. Should abuses creep into one part, they are reformed by those that remain sound. The state may be destroyed on one side, and not on the other; the con-

* "Spirit of Laws," vol. i. book ix. chap. i.—PUBLIUS.

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federacy may be dissolved, and the confederates preserve their sovereignty.

"As this government is composed of small republics, it enjoys with the internal happiness of each; and with respect to its external situation, it is possessed, by means of the association, of all the advantages of large monarchies."

I have thought it proper to quote at length these interesting passages, because they contain a luminous abridgment of the principal arguments in favor of the Union, and must effectually remove the false impressions which a misapplication of other parts of the work was calculated to make. They have, at the same time, an intimate connection with the more immediate design of this paper; which is, to illustrate the tendency of the Union to repress domestic faction and insurrection.

A distinction, more subtle than accurate, has been raised between a *Confederacy* and a *consolidation* of the States. The essential characteristic of the first is said to be the restriction of its authority to the members in their collective capacities, without reaching to the individuals of whom they are composed. It is contended that the national council ought to have no concern with any object of internal administration. An exact equality of suffrage between the members has also been insisted upon as a leading feature of a confederate government. These positions are, in the main, arbitrary; they are supported neither by principle nor precedent. It has indeed happened that governments of this kind have generally operated in the manner which the distinction, taken notice of, supposes to be inherent in their nature; but there have been in most of them extensive exceptions to the practice, which serve to prove, as far as example will go, that there is no absolute rule on the subject. And it will be clearly shown, in the course of this investigation, that, as far as the principle contended for has prevailed, it has been the cause of incurable disorder and imbecility in the government.

The definition of a *Confederate Republic* seems simply to be "an assemblage of societies," or an association of two or more states into one state. The extent, modifications, and objects of the federal authority are mere

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matters of discretion. So long as the separate organization of the members be not abolished; so long as it exists, by a constitutional necessity, for local purposes; though it should be in perfect subordination to the general authority of the union, it would still be, in fact and in theory, an association of states, or a confederacy. The proposed Constitution, so far from implying an abolition of the State governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the Senate, and leaves in their possession certain exclusive and very important portions of sovereign power. This fully corresponds, in every rational import of the terms, with the idea of a federal government.

In the Lycian confederacy, which consisted of twenty-three CITIES or republics, the largest were entitled to *three* votes in the COMMON COUNCIL, those of the middle class to *two*, and the smallest to *one*. The COMMON COUNCIL had the appointment of all the judges and magistrates of the respective CITIES. This was certainly the most delicate species of interference in their internal administration; for if there be anything that seems exclusively appropriated to the local jurisdictions, it is the appointment of their own officers. Yet Montesquieu, speaking of this association says: "Were I to give a model of an excellent Confederate Republic, it would be that of Lycia." Thus we perceive that the distinctions insisted upon were not within the contemplation of this enlightened civilian; and we shall be lead to conclude, that they are the novel refinements of an erroneous theory.

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No. 10. (*New York Daily Advertiser*, Nov. 22, 1787.) Madison.

THE UNION A CHECK ON FACTION.

Tendency of popular governments to faction—Complaints of injustice and instability in State governments—Definition of faction—Remedy of faction—Curtailment of liberty—Causes of faction innate in man—Opposing interests—Legislation by majority akin to interested judgments—Class legislation—Control of faction—Majority invasion of rights—A pure democracy unable to control faction—A remedy in representative government—Difference between a democracy and a republic—Advantages of a delegated chosen body—Superiority of large over small republics—Greater proportion of fit characters—Advantage of greater number of electors—Necessity of acquaintance with local circumstances—Happy combination of national and local governments in the United States—Greater territory and population permitted by republican than democratic government—Faction essentially local—Advantage of Union over States as to local prejudices and schemes of injustices—The Union a remedy for diseases most incident to republics.

To the People of the State of New York:

Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments never finds himself so much alarmed for their character and fate as when he contemplates their propensity to this dangerous vice. He will not fail, therefore, to set a due value on any plan which, without violating the principles to which he is attached, provides a proper cure for it. The instability, injustice, and confusion introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished; as they continue to be the favorite and fruitful topics from which the adversaries to liberty derive their most specious declamations. The valuable improvements made by the American constitutions on the popular models, both ancient and modern, cannot certainly be too much admired; but it would be an unwarrantable partiality to contend that they have as effectually obviated the danger on this side as was

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wished and expected. Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.[1] However anxiously we may wish that these complaints had no foundation, the evidence of known facts will not permit us to deny that they are in some degree true. It will be found, indeed, on a candid review of our situation, that some of the distresses under which we labor have been erroneously charged on the operation of our governments; but it will be found, at the same time, that other causes will not alone account for many of our heaviest misfortunes; and, particularly, for that prevailing and

[1] This was the almost universal defect of the State governments prior to the adoption of the Federal Constitution, and led Madison to assert that "in our Government the real power lies in the majority of the community and the invasion of . . . rights is chiefly to be apprehended, not from the acts of Government contrary to the sense of its constituents, but from the acts in which the Government is the mere instrument of the major number of the constituents." The fact is the more extraordinary as several of the States had adopted bills of rights which should have amply protected the life and property of the minority. Notable is the experience of Virginia, which embodied in its constitution the elaborate bill of rights framed by George Mason, yet in absolute contravention of its various clauses the legislature at moments practically centered all powers in its own hands. They suspended the sittings of the courts, decided their own quorum so as to place the legislative power in the hands of a minority of a majority; twice attempted to annul all constitutional authority by appointing a dictator; limited the franchise; enacted tender and other *ex post facto* laws; and attainted a man of high treason and declared his life forfeited without process of law. Such conduct produced a stinging protest from Jefferson (see quotation in *The Federalist*, No. 48). Not till the adoption of the Federal Constitution with its restraints on State powers and a Supreme Court to enforce them, was there any true check given to the State legislatures or true protection given to minorities. It is to be noted that several of the South American republics possess bills of rights and supreme courts to enforce them, without the least attaining the same results, while, to the contrary, in Great Britain, where the legislative authority is practically omnipotent, the minority, as a whole, has been fairly dealt with in the last hundred years.—EDITOR.

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increasing distrust of public engagements, and alarm for private rights, which are echoed from one end of the continent to the other. These must be chiefly, if not wholly, effects of the unsteadiness and injustice with which a factious spirit has tainted our public administrations.

By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.

There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

It could never be more truly said than of the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

The second expedient is as impracticable as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves. The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of

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government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.

The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. So strong is this propensity of mankind to fall into mutual animosities that, where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts. But the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government.

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No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine? Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side and the debtors on the other. Justice ought to hold the balance between them. Yet the parties are, and must be, themselves the judges; and the most numerous party, or, in other words, the most powerful faction, must be expected to prevail. Shall domestic manufactures be encouraged, and in what degree, by restrictions on foreign manufactures? are questions which would be differently decided by the landed and the manufacturing classes, and probably by neither with a sole regard to justice and the public good. The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice. Every shilling with which they overburden the inferior number is a shilling saved to their own pockets.

It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor in many cases can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole.

The inference to which we are brought is that the

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causes of faction cannot be removed, and that relief is only to be sought in the means of controlling its *effects*.

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. Let me add that it is the great desideratum by which this form of government can be rescued from the opprobrium under which it has so long labored, and be recommended to the esteem and adoption of mankind.

By what means is this object attainable? Evidently by one of two only: Either the existence of the same passion or interest in a majority at the same time must be prevented, or the majority, having such coexistent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression. If the impulse and the opportunity be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an adequate control. They are not found to be such on the injustice and violence of individuals, and lose their efficacy in proportion to the number combined together, that is, in proportion as their efficacy becomes needful.

From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority

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of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure and the efficacy which it must derive from the Union.

The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

The effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose. On the other hand, the effect may be inverted. Men of factious tempers, of local prejudices,

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or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interest, of the people. The question resulting is, whether small or extensive republics are more favorable to the election of proper guardians of the public weal; and it is clearly decided in favor of the latter by two obvious considerations:

In the first place, it is to be remarked that, however small the republic may be, the representatives must be raised to a certain number, in order to guard against the cabals of a few; and that, however large it may be, they must be limited to a certain number, in order to guard against the confusion of a multitude. Hence, the number of representatives in the two cases not being in proportion to that of the two constituents, and being proportionally greater in the small republic, it follows that, if the proportion of fit characters be not less in the large than in the small republic, the former will present a greater option, and consequently a greater probability of a fit choice.

In the next place, as each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried; and the suffrages of the people, being more free, will be more likely to center in men who possess the most attractive merit and the most diffusive and established characters.[1]

It must be confessed that in this, as in most other cases, there is a mean, on both sides of which inconveniences will be found to lie. By enlarging too much the number of electors, you render the representative too little acquainted with all their local circumstances and lesser interests; as by reducing it too much, you render him unduly attached to these, and too little fit to comprehend and pursue great and national objects. The federal Con-

[1] In this conclusion Madison neglected to consider the converse of his proposition, that the greater the number of electors, the fewer there would be who could personally know the candidate.—EDITOR.

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stitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures.

The other point of difference is, the greater number of citizens and extent of territory which may be brought within the compass of republican than of democratic government; and it is this circumstance principally which renders factious combinations less to be dreaded in the former than in the latter. The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or, if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other. Besides other impediments, it may be remarked that where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust in proportion to the number whose concurrence is necessary.

See Nos. 9 and 14.

Hence it clearly appears that the same advantage which a republic has over a democracy in controlling the effects of faction, is enjoyed by a large over a small republic, is enjoyed by the Union over the States composing it. Does the advantage consist in the substitution of representatives whose enlightened views and virtuous sentiments render them superior to local prejudices and to schemes of injustice? It will not be denied that the representation of the Union will be most likely to possess these requisite endowments. Does it consist in the greater security afforded by a greater variety of parties against the event of any one party

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being able to outnumber and oppress the rest? In an equal degree does the increased variety of parties comprised within the Union increase this security. Does it, in fine, consist in the greater obstacles opposed to the concert and accomplishment of the secret wishes of an unjust and interested majority? Here, again, the extent of the Union gives it the most palpable advantage.

The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district than an entire State.

In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government. And according to the degree of pleasure and pride we feel in being republicans ought to be our zeal in cherishing the spirit and supporting the character of Federalists.

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No. 11. (*Independent Journal*, November 24, 1787). Hamilton.

UTILITY OF UNION AS REGARDS COMMERCE AND A NAVY.

Adventurous commercial character of America—Commercial jealousy of Europe—A national commercial policy necessary to counteract European restrictions—Discrimination against Great Britain—Establishment of a Federal navy—The United States likely to become the arbiter of Europe in America—Disunion certain to make our commerce a prey—Separation will enable maritime nations to prescribe the conditions of our political existence—National commercial rights which will be lost by a dissolution of the Confederacy—The fisheries—A navy a great national object—Share of the South, Middle, and New England States in a navy—Unrestrained intercourse between the States—Unlikelihood of free interstate commerce without unity—Ascendency in American affairs—European domination of the world—Buffon's and Raynal's theory of degeneracy in America.

To the People of the State of New York:

The importance of the Union, in a commercial light, is one of those points about which there is least room to entertain a difference of opinion, and which has, in fact, commanded the most general assent of men who have any acquaintance with the subject. This applies as well to our intercourse with foreign countries as with each other.

There are appearances to authorize a supposition that the adventurous spirit which distinguishes the commercial character of America has already excited uneasy sensations in several of the maritime powers of Europe. They seem to be apprehensive of our too great interference in that carrying trade which is the support of their navigation and the foundation of their naval strength. Those of them which have colonies in America look forward to what this country is capable of becoming, with painful solicitude. They foresee the dangers that may threaten their American dominions from the neighborhood of States which have all the dispositions, and would possess all the means, requisite to the creation of a powerful marine. Impressions of this kind will naturally indicate the policy of fostering divisions among us, and of depriving us, as far as possible, of an ACTIVE COMMERCE in our own bottoms. This would answer the threefold purpose of pre-

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venting our interference in their navigation, of monopolizing the profits of our trade, and of clipping the wings by which we might soar to a dangerous greatness. Did not prudence forbid the detail, it would not be difficult to trace, by facts, the workings of this policy to the cabinets of ministers.

If we continue united, we may counteract a policy so unfriendly to our prosperity in a variety of ways. By prohibitory regulations extending at the same time throughout the States, we may oblige foreign countries to bid against each other for the privileges of our markets. This assertion will not appear chimerical to those who are able to appreciate the importance of the markets of three millions of people—increasing in rapid progression, for the most part exclusively addicted to agriculture, and likely from local circumstances to remain so—to any manufacturing nation; and the immense difference there would be to the trade and navigation of such a nation, between a direct communication in its own ships, and an indirect conveyance of its products and returns, to and from America, in the ships of another country. Suppose, for instance, we had a government in America capable of excluding Great Britain (with whom we have at present no treaty of commerce) from all our ports; what would be the probable operation of this step upon her politics? Would it not enable us to negotiate, with the fairest prospect of success, for commercial privileges of the most valuable and extensive kind in the dominions of that kingdom? When these questions have been asked upon other occasions, they have received a plausible, but not a solid or satisfactory answer. It has been said that prohibitions on our part would produce no change in the system of Britain, because she could prosecute her trade with us through the medium of the Dutch, who would be her immediate customers and paymasters for those articles which were wanted for the supply of our markets. But would not her navigation be materially injured by the loss of the important advantage of being her own carrier in that trade? Would not the principal part of its profits be intercepted by the Dutch, as a compensation for their agency and risk? Would not the mere circumstance of freight occasion a considerable deduction? Would not so circuitous an intercourse facilitate the competitions of other nations, by enhancing the price of British commodities in our markets, and by transferring to other hands the management of this interesting branch of the British commerce?

See No. 22.

A mature consideration of the objects suggested by these questions will justify a belief that the real disadvantages to Britain

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from such a state of things, conspiring with the prepossessions of a great part of the nation in favor of the American trade, and with the importunities of the West India Islands, would produce a relaxation in her present system, and would let us into the enjoyment of privileges in the markets of those islands and elsewhere, from which our trade would derive the most substantial benefits. Such a point gained from the British government, and which could not be expected without an equivalent in exemptions and immunities in our markets, would be likely to have a correspondent effect on the conduct of other nations, who would not be inclined to see themselves altogether supplanted in our trade.

A further resource for influencing the conduct of European nations toward us, in this respect, would arise from the establishment of a federal navy. There can be no doubt that the continuance of the Union under an efficient government would put it in our power, at a period not very distant, to create a navy which, if it could not vie with those of the great maritime powers, would at least be of respectable weight if thrown into the scale of either of two contending parties. This would be more peculiarly the case in relation to operations in the West Indies. A few ships of the line, sent opportunely to the reinforcement of either side, would often be sufficient to decide the fate of a campaign on the event of which interests of the greatest magnitude were suspended. Our position is, in this respect, a most commanding one. And if to this consideration we add that of the usefulness of supplies from this country in the prosecution of military operations in the West Indies, it will readily be perceived that a situation so favorable would enable us to bargain with great advantage for commercial privileges.

See No. 11, post. A price would be set not only upon our friendship, but upon our neutrality. By a steady adherence to the Union, we may hope, ere long, to become the arbiter of Europe in America, and to be able to incline the balance of European competitions in this part of the world as our interest may dictate.

But in the reverse of this eligible situation, we shall discover that the rivalships of the parts would make them checks upon each other, and would frustrate all the

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tempting advantages which nature has kindly placed within our reach. In a state so insignificant our commerce would be a prey to the wanton intermeddlings of all nations at war with each other; who, having nothing to fear from us, would with little scruple or remorse supply their wants by depredations on our property as often as it fell in their way. The rights of neutrality will only be respected when they are defended by an adequate power. A nation despicable by its weakness forfeits even the privilege of being neutral.[1]

Under a vigorous national government, the natural strength and resources of the country, directed to a common interest, would baffle all the combinations of European jealousy to restrain our growth. This situation would even take away the motive to such combinations, by inducing an impracticability of success. An active commerce, an extensive navigation, and a flourishing marine would then be the offspring of moral and physical necessity. We might defy the little arts of the little politicians to control or vary the irresistible and unchangeable course of nature.

But in a state of disunion these combinations might exist and might operate with success. It would be in the power of the maritime nations, availing themselves of our universal impotence, to prescribe the conditions of our political existence; and as they have a common interest in being our carriers, and still more in preventing our becoming theirs, they would in all probability combine to embarrass our navigation in such a manner as would in effect destroy it, and confine us to a PASSIVE COMMERCE. We should then be compelled to content ourselves with the first price of our commodities, and to see the profits of our trade snatched from us to enrich our enemies and persecutors. That unequaled spirit of enterprise which signalizes the genius of the American merchants and navigators, and which is in itself an inexhaustible mine of national wealth, would be stifled and lost, and poverty and disgrace would overspread a country which, with wisdom, might make herself the admiration and envy of the world.

There are rights of great moment to the trade of America which are rights of the Union—I allude to the fisheries, to the navigation of the Western lakes, and

[1] This truth was quickly proved by the course of England and France from 1794 until the War of 1812, for during that period our commerce was a prey whenever either chose.—EDITOR.

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to that of the Mississippi. The dissolution of the Confederacy would give room for delicate questions concerning the future existence of these rights; which the interest of more powerful partners would hardly fail to solve to our disadvantage. The disposition of Spain with regard to the Mississippi needs no comment. France and Britain are concerned with us in the fisheries, and view them as of the utmost moment to their navigation. They of course would hardly remain long indifferent to that decided mastery of which experience has shown us to be possessed in this valuable branch of traffic, and by which we are able to undersell those nations in their own markets. What more natural than that they should be disposed to exclude from the lists such dangerous competitors?

See No. 4.

This branch of trade ought not to be considered as a partial benefit. All the navigating States may, in different degrees, advantageously participate in it, and under circumstances of a greater extension of mercantile capital would not be unlikely to do it. As a nursery of seamen it now is, or, when time shall have more nearly assimilated the principles of navigation in the several States, will become, a universal resource. To the establishment of a navy it must be indispensable.

To this great national object, a NAVY, union will contribute in various ways. Every institution will grow and flourish in proportion to the quantity and extent of the means concentered toward its formation and support. A navy of the United States, as it would embrace the resources of all, is an object far less remote than a navy of any single State or partial confederacy, which would only embrace the resources of a single part. It happens, indeed, that different portions of confederated America possess each some peculiar advantage for this essential establishment. The more southern States furnish in greater abundance certain kinds of naval stores—tar, pitch, and turpentine. Their wood for the construction of ships is also of a more solid and lasting texture. The difference in the duration of the ships of which the navy

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might be composed, if chiefly constructed of Southern wood, would be of signal importance, either in the view of naval strength or of national economy. Some of the Southern and of the Middle States yield a greater plenty of iron, and of better quality. Seamen must chiefly be drawn from the Northern hive. The necessity of navai protection to external or maritime commerce does not require a particular elucidation, no more than the conduciveness of that species of commerce to the prosperity of a navy.

An unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets.[1] The veins of commerce in every part will be replenished, and will acquire additional motion and vigor from a free circulation of the commodities of every part. Commercial enterprise will have much greater scope, from the diversity in the productions of different States. When the staple of one fails from a bad harvest or unproductive crop, it can call to its aid the staple of another. The variety, not less than the value, of products for exportation contributes to the activity of foreign commerce. It can be conducted upon much better terms with a large number of materials of a given value than with a smaller number of materials of the same value, arising from the competitions of trade and from the fluctuations of markets. Particular articles may be in great demand at certain periods, and unsalable at others; but if there be a variety of articles, it can scarcely happen that they should all be at one time in the latter predicament, and on this account the operations of the merchant would be less liable to any considerable obstruction or stagnation. The speculative trader will at once perceive the force of these observations, and will acknowledge that the aggregate balance of the commerce

[1] Probably no single element has so much contributed to the prosperity of the United States as the fact that it is practically the largest territory in the world in which unrestricted trade is permitted.—EDITOR.

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of the United States would bid fair to be much more favorable than that of the thirteen States without union or with partial unions.

It may perhaps be replied to this that, whether the States are united or disunited, there would still be an intimate intercourse between them which would answer the same ends; but this intercourse would be fettered, interrupted, and narrowed by a multiplicity of causes, which in the course of these papers have been amply detailed. A unity of commercial, as well as political, interests, can only result from a unity of government.

There are other points of view in which this subject might be placed, of a striking and animating kind. But they would lead us too far into the regions of futurity, and would involve topics not proper for a newspaper discussion. I shall briefly observe that our situation invites and our interests prompt us to aim at an ascendant in the system of American affairs.[1] The world may politically, as well as geographic-

See No. 11, ante.

[1] In this idea is to be found an early expression of what has since come to be loosely termed the Monroe Doctrine. But unquestionably this very elastic principle, which to this day has never been precisely defined, is in truth merely one expression of a fixed conviction in the larger part of the people of the United States that European powers shall eventually be wholly excluded from the two continents of America. In 1783 Franklin urged upon the British peace-envoys the ceding of Canada and Nova Scotia to the United States, on the grounds that all true rapprochement between the two countries would be impossible so long as those territories were retained by England, and time has proved his view, for though kindred in blood with us, and with interests almost identical, Great Britain is to-day in popular estimation our greatest enemy. Scarcely less strong is the feeling against Spain, which from the first has been of all European powers the one to which we owe the most favors, yet toward which we have acted in a manner implying perpetual national enmity. Warm as the national feeling has been toward France, we aided St. Domingo to obtain its freedom by every possible, if surreptitious device; the moment news was received of Napoleon's acquisition of Louisiana, Jefferson announced that "it is impossible that France and the United States can continue long friends," and the ill-feeling her occupation of Mexico produced is still memorable. Indeed, Jefferson probably voiced, and continues to voice the instinctive feeling of his countrymen when he declared that "our confederacy must be viewed as the nest from which all America, North and South, is to be peopled," and that "the object of both must be to exclude all European influence from this hemisphere." He carried his concept so far, indeed, as even to

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ally, be divided into four parts, each having a distinct set of interests. Unhappily for the other three, Europe, by her arms and by her negotiations, by force and by fraud, has, in different degrees, extended her dominion over them all. Africa, Asia, and America have successively felt her domination. The superiority she has long maintained has tempted her to plume herself as the Mistress of the World, and to consider the rest of mankind as created for her benefit. Men admired as profound philosophers have in direct terms attributed to her inhabitants a physical superiority, and have gravely asserted that all animals, and with them the human species, degenerate in America—that even dogs cease to bark after having breathed a while in our atmosphere.* Facts have too long supported these arrogant pretensions of the Europeans. It belongs to us to vindicate the honor of the human race, and to teach that assuming

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" broach the idea that we consider the whole Gulf Stream as of our waters, in which hostilities and cruising are to be frowned upon."

How far this policy is reasonable is not easily decided. On the one hand, it is obvious that the American territories still held by European powers are far better and more peacefully governed than those which have achieved independence. To the contrary, it is certain that Europe is far more liable to wars of material importance; that the extension of those wars to the western half of the world is almost inevitable so long as they hold territories therein; and that, moreover, these colonies are the most potent cause of friction between the countries holding them and the United States (instanced in the Fisheries and Behring Sea disputes with Great Britain, and the Cuban difficulties with Spain). It is obvious that, in more than one view, European possession of American territory constitutes a menace to the peaceful policy of the United States.

It is to be regretted, in view of this policy, that President Cleveland based his interference in the Venezuelan controversy on the ground of danger to republican institutions, for the assumption appealed neither to reason nor to humanity. Had he, in place of this pretext, taken the position that the United States would hereafter insist that all disputes between Europe and America must be arbitrated, and that in no case would the United States allow European warfare to extend to this half of the world, he would have taken a far more tenable position, have advanced the interests of the United States, and have done a great service to humanity. That this position is inevitable, and is in fact as much to the interest of Europe as America, seems already settled in theory, and the President who finally establishes it as a practice will rank his name high in American history.—EDITOR.

*[De Pauw's] "Recherches philosophiques sur les Américains."—PUBLIUS. For a reply by Jefferson, see "Notes on Virginia" (Brooklyn. 1894) p. 99.—EDITOR.

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brother moderation. Union will enable us to do it. Disunion will add another victim to his triumphs. Let Americans disdain to be the instruments of European greatness! Let the thirteen States, bound together in a strict and indissoluble Union, concur in erecting one great American system, superior to the control of all transatlantic force or influence, and able to dictate the terms of the connection between the old and the new world!

PUBLIUS.

No. 12. (*New York Packet*, November 27, 1787.) Hamilton.

UTILITY OF UNIONS AS REGARDS REVENUE.

Commerce the great source of national wealth—Commerce essential to agriculture—Taxes must be apportioned to the quantity of money—Small revenues of German Empire—Poverty of state treasuries—Taxation in Great Britain—Duties the main dependence in America—Unpopularity of excise and direct taxes—Duties best levied by general government—State imposts will result in smuggling—Revenue patrols of France—Unlikelihood of smuggling under national government—Disadvantage of Britain as regards smuggling—State imposts—French and English duties—Revenue from ardent spirits—National existence impossible without revenue—Necessity for imposts—Unpopularity of excises and direct taxation—Without an impost, taxes will chiefly fall on land.

To the People of the State of New York:

The effects of Union upon the commercial prosperity of the States have been sufficiently delineated. Its tendency to promote the interests of revenue will be the subject of our present inquiry.

The prosperity of commerce is now perceived and acknowledged by all enlightened statesmen to be the most useful as well as the most productive source of national wealth, and has accordingly become a primary object of their political cares. By multiplying the means of gratification, by promoting the introduction and circulation of the precious metals,—those darling objects of human avarice and enterprise,—it serves to vivify and

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invigorate the channels of industry, and to make them flow with greater activity and copiousness. The assiduous merchant, the laborious husbandman, the active mechanic, and the industrious manufacturer—all orders of men—look forward with eager expectation and growing alacrity to this pleasing reward of their toils. The often-agitated question between agriculture and commerce has, from indubitable experience, received a decision which has silenced the rivalship that once subsisted between them, and has proved, to the satisfaction of their friends, that their interests are intimately blended and interwoven. It has been found in various countries that, in proportion as commerce has flourished, land has risen in value. And how could it have happened otherwise? Could that which procures a freer vent for the products of the earth, which furnishes new incitements to the cultivation of land, which is the most powerful instrument in increasing the quantity of money in a state—could that in fine, which is the faithful handmaid of labor and industry, in every shape, fail to augment that article, which is the prolific parent of far the greatest part of the objects upon which they are exerted? It is astonishing that so simple a truth should ever have had an adversary; and it is one, among a multitude of proofs, how apt a spirit of ill-informed jealousy, or of too great abstraction and refinement, is to lead men astray from the plainest truths of reason and conviction.

The ability of a country to pay taxes must always be proportioned, in a great degree, to the quantity of money in circulation, and to the celerity with which it circulates. Commerce, contributing to both these objects, must of necessity render the payment of taxes easier, and facilitate the requisite supplies to the treasury. The hereditary dominions of the Emperor of Germany contain a great extent of fertile, cultivated, and populous territory, a large proportion of which is situated in mild and luxuriant climates. In some parts of this territory are to be found the best gold and silver mines in Europe. And yet, from the want of the fostering

See Nos. 30-36.

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influence of commerce, that monarch can boast but slender revenues. He has several times been compelled to owe obligations to the pecuniary succors of other nations for the preservation of his essential interests, and is unable, upon the strength of his own resources, to sustain a long or continued war.

But it is not in this aspect of the subject alone that Union will be seen to conduce to the purpose of revenue. There are other points of view, in which its influence will appear more immediate and decisive. It is evident from the state of the country, from the habits of the people, from the experience we have had on the point itself, that it is impracticable to raise any very considerable sums by direct taxation. Tax laws have in vain been multiplied; new methods to enforce the collection have in vain been tried; the public expectation has been uniformly disappointed, and the treasuries of the States have remained empty. The popular system of administration inherent in the nature of popular government, coinciding with the real scarcity of money incident to a languid and mutilated state of trade, has hitherto defeated every experiment for extensive collections, and has at length taught the different legislatures the folly of attempting them.

No person acquainted with what happens in other countries will be surprised at this circumstance. In so opulent a nation as that of Britain, where direct taxes from superior wealth must be much more tolerable, and from the vigor of the government much more practicable, than in America, far the greatest part of the national revenue is derived from taxes of the indirect kind, from imposts, and from excises. Duties on imported articles form a large branch of this latter description.

In America it is evident that we must a long time depend for the means of revenue chiefly on such duties. In most parts of it, excises must be confined within a narrow compass. The genius of the people will ill brook the inquisitive and peremptory spirit of excise laws.[1] The pockets of the farmers, on the other hand, will

[1] So unpopular was an excise tax in the last century that only three of the colonies had levied it in colonial times, and not one state had dared to use it as a source of revenue in the period from 1774 to 1787. In the New York convention which ratified the constitution it was twice moved to restrain wholly the national government from this form of taxation, and two of the states, in their suggested amendments, wished all excises to be apportioned on the states, leaving to each the question how to raise its proportion. The reason of this unpopularity was due to the circumstance of the tax being practically the only one which fell on the product of the small farmer, to whom ready money was always a rare

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reluctantly yield but scanty supplies, in the unwelcome shape of impositions on their houses and lands; and personal property is too precarious and invisible a fund to be laid hold of in any other way than by the imperceptible agency of taxes on consumption.

If these remarks have any foundation, that state of things which will best enable us to improve and extend so valuable a resource must be best adapted to our political welfare. And it cannot admit of a serious doubt that this state of things must rest on the basis of a general Union. As far as this would be conducive to the interests of commerce, so far it must tend to the extension of the revenue to be drawn from that source. As far as it would contribute to rendering regulations for the collection of the duties more simple and efficacious, so far it must serve to answer the purposes of making the same rate of duties more productive, and of putting it into the power of the government to increase the rate without prejudice to trade.

The relative situation of these States; the number of rivers with which they are intersected, and of bays that wash their shores; the facility of communication in every direction; the affinity of language and manners; the familiar habits of intercourse;—all these are circumstances that would conspire to render an illicit trade between them a matter of little difficulty, and would insure frequent evasions of the commercial regulations of each other. The separate States or confederacies would be necessitated by mutual jealousy to avoid

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possession, all other taxes on consumption being levied on the mercantile classes, who easily commanded the cash advance which the tax entailed. Almost with the foundation of the national government, Hamilton advocated and obtained an excise tax, which in turn produced the Whisky Rebellion. An excise was instituted in the War of 1812 and also in the Civil War; the latter became permanent, and now produces almost half the government revenues. That it is no longer an unpopular tax is due to the fact that the production of spirits, beer, and tobacco is now controlled by great manufacturing corporations, which have no difficulty in commanding ready money. Where the same conditions still exist which formerly made the tax unpopular (the moonshine distilleries of the Southern mountains), it is as much hated as ever. See articles of E. C. James on Excises, and W. C. Ford on Internal Revenue, in Lalor's "Cyclopædia of Political Science." The same change in public opinion has occurred in Great Britain. Johnson, in his Dictionary, defined Excise as "a hateful tax levied upon commodities, and adjudged not by the common judges of property, but wretches hired by those to whom excise is paid," while now the beer tax is the one invariably used to round out the yearly budget.—EDITOR.

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the temptations to that kind of trade by the lowness of their duties. The temper of our governments, for a long time to come, would not permit those rigorous precautions by which the European nations guard the avenues into their respective countries, as well by land as by water; and which, even there, are found insufficient obstacles to the adventurous stratagems of avarice.

In France, there is an army of patrols (as they are called) constantly employed to secure their fiscal regulations against the inroads of the dealers in contraband trade. Mr. Neckar computes the number of these patrols at upwards of twenty thousand. This shows the immense difficulty in preventing that species of traffic, where there is an inland communication, and places in a strong light the disadvantages with which the collection of duties in this country would be encumbered, if by disunion the States should be placed in a situation, with respect to each other, resembling that of France with respect to her neighbors. The arbitrary and vexatious powers with which the patrols are necessarily armed would be intolerable in a free country.

If, on the contrary, there be but one government pervading all the States, there will be, as to the principal part of our commerce, but ONE SIDE to guard—the ATLANTIC COAST. Vessels arriving directly from foreign countries, laden with valuable cargoes, would rarely choose to hazard themselves to the complicated and critical perils which would attend attempts to unlade prior to their coming into port. They would have to dread both the dangers of the coast, and of detection, as well after as before their arrival at the places of their final destination. An ordinary degree of vigilance would be competent to the prevention of any material infractions upon the rights of the revenue. A few armed vessels, judiciously stationed at the entrances of our ports, might at a small expense be made useful sentinels of the laws. And the government having the same interest to provide against violations everywhere, the co-operation of its measures in each State would have a powerful tendency to render them effectual. Here also we should preserve, by Union, an advantage which nature holds out to us, and which would be relinquished by separation. The

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United States lie at a great distance from Europe, and at a considerable distance from all other places with which they would have extensive connections of foreign trade. The passage from them to us, in a few hours, or in a single night, as between the coasts of France and Britain, and of other neighboring nations, would be impracticable. This is a prodigious security against a direct contraband with foreign countries; but a circuitous contraband to one State, through the medium of another, would be both easy and safe. The difference between a direct importation from abroad, and an indirect importation through the channel of a neighboring State, in small parcels, according to time and opportunity, with the additional facilities of inland communication, must be palpable to every man of discernment.

It is therefore evident that one national government would be able, at much less expense, to extend the duties on imports, beyond comparison, further than would be practicable to the States separately, or to any partial confederacies. Hitherto, I believe, it may safely be asserted that these duties have not upon an average exceeded in any State three per cent. In France they are estimated to be about fifteen per cent., and in Britain they exceed this proportion.* There seems to be nothing to hinder their being increased in this country to at least treble their present amount. The single article of ardent spirits, under federal regulation, might be made to furnish a considerable revenue. Upon a ratio to the importation into this State, the whole quantity imported into the United States may be estimated at four millions of gallons; which, at a shilling per gallon, would produce two hundred thousand pounds. That article would well bear this rate of duty; and if it should tend to diminish the consumption of it, such an effect would be equally favorable to the agriculture, to the economy, to the morals, and to the health of the society. There is, perhaps, nothing so much a subject of national extravagance as these spirits.

* If my memory be right they amount to twenty per cent.—PUBLIUS.

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What will be the consequence, if we are not able to avail ourselves of the resource in question in its full extent? A nation cannot long exist without revenues. Destitute of this essential support, it must resign its independence and sink into the degraded condition of a province. This is an extremity to which no government will of choice accede. Revenue, therefore, must be had at all events. In this country, if the principal part be not drawn from commerce, it must fall with oppressive weight upon land. It has been already intimated that excises, in their true signification, are too little in unison with the feelings of the people to admit of great use being made of that mode of taxation; nor, indeed, in the States where almost the sole employment is agriculture, are the objects proper for excise sufficiently numerous to permit very ample collections in that way. Personal estate (as has been before remarked), from the difficulty in tracing it, cannot be subjected to large contributions by any other means than by taxes on consumption. In populous cities, it may be enough the subject of conjecture to occasion the oppression of individuals without much aggregate benefit to the State; but beyond these circles it must, in a great measure, escape the eye and the hand of the tax-gatherer. As the necessities of the State, nevertheless, must be satisfied in some mode or other, the defect of other resources must throw the principal weight of public burdens on the possessors of land. And as, on the other hand, the wants of the government can never obtain an adequate supply, unless all the sources of revenue are open to its demands, the finances of the community, under such embarrassments, cannot be put into a situation consistent with its respectability or its security. Thus we shall not even have the consolations of a full treasury to atone for the oppression of that valuable class of the citizens who are employed in the cultivation of the soil. But public and private distress will keep pace with each other in gloomy concert; and unite in deploring the infatuation of those counsels which led to disunion.

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No. 13. (*Independent Journal*, November 28, 1787.) Hamilton.

ADVANTAGES OF UNION FROM THE STANDPOINT OF ECONOMY.

Smaller expense of civil list—Civil lists of separate confederacies—Example of Great Britain—Probable lines of division of proposed confederacies—A Northern and a Southern league—Position of Pennsylvania—Greater economy of one confederacy.

To the People of the State of New York:

As connected with the subject of revenue, we may with propriety consider that of economy. The money saved from one object may be usually applied to another, and there will be so much the less to be drawn from the pockets of the people. If the States are united under one government, there will be but one national civil list to support; if they are divided into several confederacies, there will be as many different national civil lists to be provided for—and each of them, as to the principal departments, coextensive with that which would be necessary for a government of the whole.

See No. 84.

The entire separation of the States into thirteen unconnected sovereignties is a project too extravagant and too replete with danger to have many advocates. The ideas of men who speculate upon the dismemberment of the empire seem generally turned towards three confederacies—one consisting of the four Northern, another of the four Middle, and a third of the five Southern States. There is little probability that there would be a greater number. According to this distribution, each confederacy would comprise an extent of territory larger than that of the kingdom of Great Britain. No well-informed man will suppose that the affairs of such a confederacy can be properly regulated by a government less comprehensive in its organs or institutions than that which has been proposed by the Convention. When the dimensions of a State attain to a certain magnitude, it requires the same energy of government and the same forms of administration which are requisite in one of much greater extent. This idea admits not of precise demonstration, because there is no rule by which we can measure the momentum of civil power necessary to the government of any given number of individuals; but when we consider that the island of Britain, nearly commensurate with each of the supposed confederacies, contains about eight millions of people, and when we reflect upon the degree of authority required to direct the passions of so large a society to the public

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good, we shall see no reason to doubt that the like portion of power would be sufficient to perform the same task in a society far more numerous. Civil power, properly organized and exerted, is capable of diffusing its force to a very great extent; and can, in a manner, reproduce itself in every part of a great empire by a judicious arrangement of subordinate institutions.

The supposition that each confederacy into which the States would be likely to be divided would require a government not less comprehensive than the one proposed, will be strengthened by another supposition, more probable than that which presents us with three confederacies as the alternative to a general Union. If we attend carefully to geographical and commercial considerations, in conjunction with the habits and prejudices of the different States, we shall be led to conclude that in case of disunion they will most naturally league themselves under two governments. The four Eastern States, from all the causes that form the links of national sympathy and connection, may with certainty be expected to unite. New York, situated as she is, would never be unwise enough to oppose a feeble and unsupported flank to the weight of that confederacy. There are other obvious reasons that would facilitate her accession to it. New Jersey is too small a State to think of being a frontier, in opposition to this still more powerful combination; nor do there appear to be any obstacles to her admission into it. Even Pennsylvania would have strong inducements to join the Northern league. An active foreign commerce, on the basis of her own navigation, is her true policy, and coincides with the opinions and dispositions of her citizens. The more Southern States, from various circumstances, may not think themselves much interested in the encouragement of navigation. They may prefer a system which would give unlimited scope to all nations to be the carriers as well as the purchasers of their commodities. Pennsylvania may not choose to confound her interests in a connection so adverse to her policy. As she must at all events be a frontier, she may deem it most consistent with her safety to have her exposed side turned towards the weaker power of the Southern rather than towards the stronger power of the Northern Confederacy. This would give her the fairest chance to avoid being the Flanders of America. Whatever may be the determination of Pennsylvania, if the Northern Confederacy includes New Jersey, there is no likelihood of more than one confederacy to the south of that State.

See Nos. 1 and 5.

Nothing can be more evident than that the thirteen States will

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be able to support a national government better than one-half, or one-third, or any number less than the whole. This reflection must have great weight in obviating that objection to the proposed plan, which is founded on the principle of expense; an objection, however, which when we come to take a nearer view of it, will appear in every light to stand on mistaken ground.

If in addition to the consideration of a plurality of civil lists, we take into view the number of persons who must necessarily be employed to guard the inland communication between the different confederacies against illicit trade, and who in time will infallibly spring up out of the necessities of revenue; and if we also take into view the military establishments which it has been shown would unavoidably result from the jealousies and conflicts of the several nations into which the States would be divided, we shall clearly discover that a separation would be not less injurious to the economy, than to the tranquillity, commerce, revenue, and liberty of every part. PUBLIUS.

No. 14. (*New York Packet*, November 30, 1787.) Madison.

OBJECTIONS TO THE EXTENT OF TERRITORY.

An imaginary difficulty—Confusion of a republic with a democracy—Error of celebrated democracies—Mechanical power of representation—Natural limit of a democracy—Experience in representation under the confederacy—Dimensions of the United States—Size of European countries—Limited jurisdiction of general government—Value of subordinate governments in relation to size of territory—Eventual growth of Union—Internal improvements facilitated—The more distant the State the greater the need of national government—Warning against those who favor disunion.

To the People of the State of New York:

We have seen the necessity of the Union, as our bulwark against foreign danger, as the conservator of peace among ourselves, as the guardian of our commerce and other common interests, as the only substitute for those military establishments which have subverted the liberties of the Old World, and as the proper antidote for the diseases of faction, which have proved fatal to other

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popular governments, and of which alarming symptoms have been betrayed by our own. All that remains within this branch of our inquiries is to take notice of an objection that may be drawn from the great extent of country which the Union embraces. A few observations on this subject will be the more proper, as it is perceived that the adversaries of the new Constitution are availing themselves of the prevailing prejudice with regard to the practicable sphere of republican administration, in order to supply by imaginary difficulties the want of those solid objections which they endeavor in vain to find.

The error which limits republican government to a narrow district has been unfolded and refuted in preceding papers. I remark here only that it seems to owe its rise and prevalence chiefly to the confounding of a republic with a democracy, applying to the former reasonings drawn from the nature of the latter. The true distinction between these forms was also adverted to on a former occasion. It is that, in a democracy, the people meet and exercise the government in person; in a republic, they assemble and administer it by their representatives and agents. A democracy, consequently, will be confined to a small spot. A republic may be extended over a large region.

See Nos. 9 and 10.

To this accidental source of the error may be added the artifice of some celebrated authors, whose writings have had a great share in forming the modern standard of political opinions. Being subjects either of an absolute or limited monarchy, they have endeavored to heighten the advantages, or palliate the evils of those forms, by placing in comparison the vices and defects of the republican, and by citing as specimens of the latter the turbulent democracies of ancient Greece and modern Italy. Under the confusion of names, it has been an easy task to transfer to a republic observations applicable to a democracy only; and among others, the observation that it can never be established but among a small number of people, living within a small compass of territory.

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Such a fallacy may have been the less perceived, as most of the popular governments of antiquity were of the democratic species; and even in modern Europe, to which we owe the great principle of representation, no example is seen of a government wholly popular, and founded, at the same time, wholly on that principle.[1] If Europe has the merit of discovering this great mechanical power in government, by the simple agency of which the will of the largest political body may be concentered, and its force directed to any object which the public good requires, America can claim the merit of making the discovery the basis of unmixed and extensive republics. It is only to be lamented that any of her citizens should wish to deprive her of the additional merit of displaying its full efficacy in the establishment of the comprehensive system now under her consideration.

See No. 52.

As the natural limit of a democracy is that distance from the central point which will just permit the most remote citizens to assemble as often as their public functions demand, and will include no greater number than can join in those functions; so the natural limit of a republic is that distance from the center which will barely allow the representatives to meet as often as may be necessary for the administration of public affairs. Can it be said that the limits of the United States exceed this distance? It will not be said by those who recollect that the Atlantic coast is the longest side of the Union, that during the term of thirteen years the representatives of the States have been almost continually assembled, and that the members from the most distant States are not chargeable with greater intermissions of attendance

[1] It would be difficult to state more clearly than has been done by John Fiske, in the first chapter of his "Beginnings of New England," the history of representative government. Briefly, he outlines what he terms: 1st, the Oriental idea, or "conquest without incorporation"; 2d, the Roman idea, or "conquest with incorporation, but without representation"; and 3d, the Teutonic or English idea, in which representation was an acknowledged right.—EDITOR.

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than those from the States in the neighborhood of Congress.

That we may form a juster estimate with regard to this interesting subject, let us resort to the actual dimensions of the Union. The limits as fixed by the treaty of peace, are: on the east the Atlantic, on the south the latitude of 31 degrees, on the west the Mississippi, and on the north an irregular line, running in some instances beyond the 45th degree, in others falling as low as the 42d. The southern shore of Lake Erie lies below that latitude. Computing the distance between the 31st and 45th degrees, it amounts to 973 common miles; computing it from 31 to 42 degrees to 764½ miles. Taking the mean for the distance, the amount will be 868¼ miles. The mean distance from the Atlantic to the Mississippi does not probably exceed 750 miles. On a comparison of this extent with that of several countries in Europe, the practicability of rendering our system commensurate to it appears to be demonstrable. It is not a great deal larger than Germany, where a diet representing the whole empire is continually assembled; or than Poland before the late dismemberment, where another national diet was the depository of the supreme power. Passing by France and Spain, we find that in Great Britain, inferior as it may be in size, the representatives of the northern extremity of the island have as far to travel to the national council as will be required of those of the most remote parts of the Union.

Favorable as this view of the subject may be, some observations remain which will place it in a light still more satisfactory.

In the first place it is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any. The subordinate governments, which can extend their care to all those other objects which can be separately provided for, will retain their due authority and activity. Were it proposed by the plan of the Convention to abolish the governments of the particular States, its adversaries would have some ground for their objection; though it would not be difficult to show that if they were abolished the general government would be compelled, by the

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principle of self-preservation, to reinstate them in their proper jurisdiction.

A second observation to be made is that the immediate object of the federal Constitution is to secure the union of the thirteen primitive States, which we know to be practicable; and to add to them such other States as may arise in their own bosoms, or in their neighborhoods, which we cannot doubt to be equally practicable. The arrangements that may be necessary for those angles and fractions of our territory which lie on our northwestern frontier must be left to those whom further discoveries and experience will render more equal to the task.

Let it be remarked, in the third place, that the intercourse throughout the Union will be facilitated by new improvements. Roads will everywhere be shortened, and kept in better order; accommodations for travelers will be multiplied and meliorated; an interior navigation on our eastern side will be opened throughout, or nearly throughout, the whole extent of the thirteen States. The communication between the Western and Atlantic districts, and between different parts of each, will be rendered more and more easy by those numerous canals with which the beneficence of nature has intersected our country, and which art finds it so little difficult to connect and complete.

A fourth and still more important consideration is that, as almost every State will, on one side or other, be a frontier, and will thus find, in a regard to its safety, an inducement to make some sacrifices for the sake of the general protection; so the States which lie at the greatest distance from the heart of the Union, and which, of course, may partake least of the ordinary circulation of its benefits, will be at the same time immediately contiguous to foreign nations, and will consequently stand, on particular occasions, in greatest need of its strength and resources. It may be inconvenient for Georgia, or the States forming our western or northeastern borders, to send their representatives to the seat of government;

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but they would find it more so to struggle alone against an invading enemy, or even to support alone the whole expense of those precautions which may be dictated by the neighborhood of continual danger. If they should derive less benefit, therefore, from the Union in some respects than the less distant States, they will derive greater benefit from it in other respects, and thus the proper equilibrium will be maintained throughout.

I submit to you, my fellow-citizens, these considerations, in full confidence that the good sense which has so often marked your decisions will allow them their due weight and effect; and that you will never suffer difficulties, however formidable in appearance, or however fashionable the error on which they may be founded, to drive you into the gloomy and perilous scene into which the advocates for disunion would conduct you. Hearken not to the unnatural voice which tells you that the people of America, knit together as they are by so many cords of affection, can no longer live together as members of the same family; can no longer continue the mutual guardians of their mutual happiness; can no longer be fellow-citizens of one great, respectable and flourishing empire. Hearken not to the voice which petulantly tells you that the form of government recommended for your adoption is a novelty in the political world; that it has never yet had a place in the theories of the wildest projectors; that it rashly attempts what it is impossible to accomplish. No, my countrymen, shut your ears against this unhallowed language. Shut your hearts against the poison which it conveys; the kindred blood which flows in the veins of American citizens, the mingled blood which they have shed in defense of their sacred rights, consecrate their Union, and excite horror at the idea of their becoming aliens, rivals, enemies. And if novelties are to be shunned, believe me, the most alarming of all novelties, the most wild of all projects, the most rash of all attempts, is that of rending us in pieces, in order to preserve our liberties and promote our happiness. But why is the experiment of an extended republic to be rejected, merely because it may comprise what is new? Is it not the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience? To this manly spirit, posterity will be indebted for the possession,

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and the world for the example, of the numerous innovations displayed on the American theater, in favor of private rights and public happiness. Had no important step been taken by the leaders of the Revolution for which a precedent could not be discovered, no government established of which an exact model did not present itself, the people of the United States might, at this moment, have been numbered among the melancholy victims of misguided councils, must at best have been laboring under the weight of some of those forms which have crushed the liberties of the rest of mankind. Happily for America, happily, we trust, for the whole human race, they pursued a new and more noble course. They accomplished a revolution which has no parallel in the annals of human society. They reared the fabrics of governments which have no model on the face of the globe. They formed the design of a great Confederacy, which it is incumbent on their successors to improve and perpetuate. If their works betray imperfections, we wonder at the fewness of them. If they erred most in the structure of the Union, this was the work most difficult to be executed; this is the work which has been new modeled by the act of your Convention, and it is that act on which you are now to deliberate and to decide. PUBLIUS.

No. 15. (*Independent Journal*, December 1, 1787.) **Hamilton.**

DEFECTS OF THE PRESENT CONFEDERATION IN ITS DEPENDENCE ON THE STATE GOVERNMENTS.

The insufficiency of the confederation a self-evident truth—Sketch of existing national humiliation—Contradictory conduct of opposers of the constitution—Necessity of a government that shall act on individuals—A government acting on the state governments nothing but an alliance—Epidemic rage in Europe for leagues—A league versus a confederate government in America—Distinction between a government acting on a state and one acting on individuals—Common interest ineffectual to obtain obedience to the Union—Origin of government—Centrifugal tendency of all confederacies—National laws will not be enforced by state governments—Various action of the thirteen states—Impotence of the Congress—Example of the various states.

To the People of the State of New York:

In the course of the preceding papers I have endeavored, my fellow-citizens, to place before you in a clear and convincing light,

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the importance of Union to your political safety and happiness. I have unfolded to you a complication of dangers to which you would be exposed, should you permit that sacred knot which binds the people of America together to be severed or dissolved by ambition or by avarice, by jealousy or by misrepresentation. In the sequel of the inquiry through which I propose to accompany you, the truths intended to be inculcated will receive further confirmation from facts and arguments hitherto unnoticed. If the road over which you will still have to pass should in some places appear to you tedious or irksome, you will recollect that you are in quest of information on a subject the most momentous which can engage the attention of a free people, that the field through which you have to travel is in itself spacious, and that the difficulties of the journey have been unnecessarily increased by the mazes with which sophistry has beset the way. It will be my aim to remove the obstacles from your progress in as compendious a manner as it can be done, without sacrificing utility to dispatch.

In pursuance of the plan which I have laid down for the discussion of the subject, the point next in order to be examined is the "insufficiency of the present Confederation to the preservation of the Union." It may perhaps be asked what need there is of reasoning or proof to illustrate a position which is not either controverted or doubted, to which the understandings and feelings of all classes of men assent, and which in substance is admitted by the opponents as well as by the friends of the new Constitution. It must in truth be acknowledged that, however these may differ in other respects, they in general appear to harmonize in this sentiment, at least, that there are material imperfections in our national system, and that something is necessary to be done to rescue us from impending anarchy. The facts that support this opinion are no longer objects of speculation. They have forced themselves upon the sensibility of the people at large, and have at length extorted from those whose mistaken policy has had the principal share in precipitating the extremity at which we are arrived, a reluctant confession of the reality of those defects in the scheme of our federal government, which have been long pointed out and regretted by the intelligent friends of the Union.

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We may indeed with propriety be said to have reached almost the last stage of national humiliation. There is scarcely anything that can wound the pride or degrade the character of an independent nation which we do not experience. Are there engagements to the performance of which we are held by every tie respectable among men? These are the subjects of constant and unblushing violation. Do we owe debts to foreigners and to our own citizens contracted in a time of imminent peril for the preservation of our political existence? These remain without any proper or satisfactory provision for their discharge. Have we valuable territories and important posts in the possession of a foreign power which, by express stipulations, ought long since to have been surrendered? These are still retained, to the prejudice of our interests, not less than of our rights. Are we in a condition to resent or to repel the aggression? We have neither troops, nor treasury, nor government.* Are we even in a condition to remonstrate with dignity? The just imputations on our own faith, in respect to the same treaty, ought first to be removed. Are we entitled by nature and compact to a free participation in the navigation of the Mississippi? Spain excludes us from it. Is public credit an indispensable resource in time of public danger? We seem to have abandoned its cause as desperate and irretrievable. Is commerce of importance to national wealth? Ours is at the lowest point of declension. Is respectability in the eyes of foreign powers a safeguard against foreign encroachments? The imbecility of our government even forbids them to treat with us. Our ambassadors abroad are the mere pageants of mimic sovereignty. Is a violent and unnatural decrease in the value of land a symptom of national distress? The price of improved land in most parts of the country is much lower than can be accounted for by the quantity of waste land at market, and can only be fully explained by that want of private and public confidence, which is so alarmingly prevalent among all ranks, and which has a direct tendency to depreciate property of every kind. Is private credit the friend and patron of industry? That most useful kind which relates to borrowing and lending is reduced within the narrowest limits, and this still more from an opinion of insecurity than from the scarcity of money. To shorten an enumeration of particulars which can afford neither pleasure nor instruction, it may in general be demanded, what indication is there of national disorder, poverty, and insignificance that could befall a community so peculiarly blessed with natural advantages as we

* "I mean for the Union."—PUBLIUS.

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are, which does not form a part of the dark catalogue of our public misfortunes?

This is the melancholy situation to which we have been brought by those very maxims and councils which would now deter us from adopting the proposed Constitution; and which, not content with having conducted us to the brink of a precipice, seem resolved to plunge us into the abyss that awaits us below. Here, my countrymen, impelled by every motive that ought to influence an enlightened people, let us make a firm stand for our safety, our tranquillity, our dignity, our reputation. Let us at last break the fatal charm which has too long seduced us from the paths of felicity and prosperity.

It is true, as has been before observed, that facts, too stubborn to be resisted, have produced a species of general assent to the abstract proposition that there exist material defects in our national system; but the usefulness of the concession, on the part of the old adversaries of federal measures, is destroyed by a strenuous opposition to a remedy, upon the only principles that can give it a chance of success. While they admit that the government of the United States is destitute of energy, they contend against conferring upon it those powers which are requisite to supply that energy. They seem still to aim at things repugnant and irreconcilable; at an augmentation of federal authority, without a diminution of State authority; at sovereignty in the Union, and complete independence in the members. They still, in fine, seem to cherish with blind devotion the political monster of an *imperium in imperio*. This renders a full display of the principal defects of the Confederation necessary, in order to show that the evils we experience do not proceed from minute or partial imperfections, but from fundamental errors in the structure of the building, which cannot be amended otherwise than by an alteration in the first principles and main pillars of the fabric.

The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as

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contradistinguished from the INDIVIDUALS of which they consist. Though this principle does not run through all the powers delegated to the Union, yet it pervades and governs those on which the efficacy of the rest depends. Except as to the rule of apportionment, the United States has an indefinite discretion to make requisitions for men and money; but they have no authority to raise either by regulations extending to the individual citizens of America. The consequence of this is that, though in theory their resolutions concerning those objects are laws constitutionally binding on the members of the Union, yet in practice they are mere recommendations which the States observe or disregard at their option.

It is a singular instance of the capriciousness of the human mind that, after all the admonitions we have had from experience on this head, there should still be found men who object to the new Constitution for deviating from a principle which has been found the bane of the old, and which is in itself evidently incompatible with the idea of GOVERNMENT; a principle, in short, which, if it is to be executed at all, must substitute the violent and sanguinary agency of the sword for the mild influence of the magistracy.

There is nothing absurd or impracticable in the idea of a league or alliance between independent nations for certain defined purposes precisely stated in a treaty regulating all the details of time, place, circumstance, and quantity; leaving nothing to future discretion; and depending for its execution on the good faith of the parties. Compacts of this kind exist among all civilized nations, subject to the usual vicissitudes of peace and war, of observance and non-observance, as the interests or passions of the contracting powers dictate. In the early part of the present century there was an epidemical rage in Europe for this species of compacts, from which the politicians of the times fondly hoped for benefits which were never realized. With a view to establishing the equilibrium of power and the peace of that part of the

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world, all the resources of negotiation were exhausted, and triple and quadruple alliances were formed; but they were scarcely formed before they were broken, giving an instructive but afflicting lesson to mankind, how little dependence is to be placed on treaties which have no other sanction than the obligations of good faith, and which oppose general considerations of peace and justice to the impulse of any immediate interest or passion.[1]

If the particular States in this country are disposed to stand in a similar relation to each other, and to drop the project of a general DISCRETIONARY SUPERINTENDENCE, the scheme would indeed be pernicious, and would entail upon us all the mischiefs which have been enumerated under the first head; but it would have the merit of being, at least, consistent and practicable. Abandoning all views towards a confederate government, this would bring us to a simple alliance offensive and defensive; and would place us in a situation to be alternative friends and enemies of each other, as our mutual jealousies and rivalships, nourished by the intrigues of foreign nations, should prescribe to us.

But if we are unwilling to be placed in this perilous situation; if we still will adhere to the design of a national government, or, which is the same thing, of a superintending power, under the direction of a common council, we must resolve to incorporate into our plan those ingredients which may be considered as forming the characteristic difference between a league and a government; we must extend the authority of the Union to the persons of the citizens—the only proper objects of government.

Government implies the power of making laws. It is essential to the idea of a law that it be attended with a sanction; or, in other words, a penalty or punishment for

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[1] An extreme example of the value of treaties is furnished in the recent revelations of Bismarck, by which it was shown that the German Empire, while bound by the Dreibund to Austria and Italy, had at the same time a secret treaty with Russia, which nullified the most essential provisions of the compact.—EDITOR.

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disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation. This penalty, whatever it may be, can only be inflicted in two ways: by the agency of the courts and ministers of justice, or by military force; by the COERCION of the magistracy, or by the COERCION of arms. The first kind can evidently apply only to men; the last kind must, of necessity, be employed against bodies politic, or communities, or States. It is evident that there is no process of a court by which the observance of the laws can, in the last resort, be enforced. Sentences may be denounced against them for violations of their duty; but these sentences can only be carried into execution by the sword. In an association where the general authority is confined to the collective bodies of the communities that compose it, every breach of the laws must involve a state of war; and military execution must become the only instrument of civil obedience. Such a state of things can certainly not deserve the name of government, nor would any prudent man choose to commit his happiness to it.

There was a time when we were told that breaches by the States of the regulations of the federal authority were not to be expected; that a sense of common interest would preside over the conduct of the respective members, and would beget a full compliance with all the constitutional requisitions of the Union. This language, at the present day, would appear as wild as a great part of what we now hear from the same quarter will be thought, when we shall have received further lessons from that best oracle of wisdom, experience. It at all times betrayed an ignorance of the true springs by which human conduct is actuated, and belied the original inducements to the establishment of civil power. Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice, without constraint. Has it been found that bodies of men act with more rectitude or greater disin-

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terestedness than individuals? The contrary of this has been inferred by all accurate observers of the conduct of mankind; and the inference is founded upon obvious reasons. Regard to reputation has a less active influence when the infamy of a bad action is to be divided among a number, than when it is to fall singly upon one. A spirit of faction, which is apt to mingle its poison in the deliberations of all bodies of men, will often hurry the persons of whom they are composed into improprieties and excesses for which they would blush in a private capacity.

In addition to all this there is in the nature of sovereign power an impatience of control, that disposes those who are invested with the exercise of it to look with an evil eye upon all external attempts to restrain or direct its operations. From this spirit it happens that, in every political association which is formed upon the principle of uniting in a common interest a number of lesser sovereignties, there will be found a kind of eccentric tendency in the subordinate or inferior orbs, by the operation of which there will be a perpetual effort in each to fly off from the common center. This tendency is not difficult to be accounted for. It has its origin in the love of power. Power controlled or abridged is almost always the rival and enemy of that power by which it is controlled or abridged. This simple proposition will teach us how little reason there is to expect that the persons intrusted with the administration of the affairs of the particular members of a confederacy will at all times be ready, with perfect good-humor and an unbiased regard to the public weal, to execute the resolutions or decrees of the general authority. The reverse of this results from the constitution of human nature.

If, therefore, the measures of the Confederacy cannot be executed without the intervention of the particular administrations, there will be little prospect of their being executed at all. The rulers of the respective members, whether they have a constitutional right to do it or not, will undertake to judge of the propriety of the measures themselves. They will consider the conformity

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of the thing proposed or required to their immediate interests or aims; the momentary conveniences or inconveniences that would attend its adoption. All this will be done; and in a spirit of interested and suspicious scrutiny, without that knowledge of national circumstances and reasons of state which is essential to a right judgment, and with that strong predilection in favor of local objects which can hardly fail to mislead the decision. The same process must be repeated in every member of which the body is constituted; and the execution of the plans, framed by the councils of the whole, will always fluctuate on the discretion of the ill-informed and prejudiced opinion of every part. Those who have been conversant in the proceedings of popular assemblies; who have seen how difficult it often is, where there is no exterior pressure of circumstances, to bring them to harmonious resolutions on important points, will readily conceive how impossible it must be to induce a number of such assemblies, deliberating at a distance from each other, at different times, and under different impressions, long to co-operate in the same views and pursuits.

In our case, the concurrence of thirteen distinct sovereign wills is requisite, under the Confederation, to the complete execution of every important measure that proceeds from the Union. It has happened as was to have been foreseen. The measures of the Union have not been executed; the delinquencies of the States have, step by step, matured themselves to an extreme, which has at length arrested all the wheels of the national government and brought them to an awful stand. Congress at this time scarcely possesses the means of keeping up the forms of administration; till the States can have time to agree upon a more substantial substitute for the present shadow of a federal government. Things did not come to this desperate extremity at once. The causes which have been specified produced at first only unequal and disproportionate degrees of compliance with the requisitions of the Union. The greater deficiencies of some States furnished the pretext of example and the temptation of interest to the complying or to the least delinquent States. Why should we do more in proportion than those who are embarked with us in the same political voyage? Why should we consent to bear more than our proper share of the

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common burden? These were suggestions which human selfishness could not withstand, and which even speculative men, who looked forward to remote consequences, could not, without hesitation, combat. Each State, yielding to the persuasive voice of immediate interest or convenience, has successively withdrawn its support, till the frail and tottering edifice seems ready to fall upon our heads and to crush us beneath its ruins.

PUBLIUS.

No. 16. (*New York Packet*, December, 4, 1787.) Hamilton.

DEFECT OF THE CONFEDERATION IN ITS INABILITY TO COERCE.

The only constitutional remedy against delinquent states is force—Impossibility of coercion—Sympathy between the states—Probable appeal of states to foreign nations—A probable dissolution of the Union—Unlikelihood of states supporting a national government—Certainty of degeneration into a military despotism—Impossibility of coercing the larger states—Military coercion a signal for civil war—The new government must extend to citizens—State resistance of national law—The distinction between non-compliance and active resistance—The new constitution puts state resistance in its true light—Employment of state agencies by national government—No form of government safe from revolution.

To the People of the State of New York:

The tendency of the principle of legislation for States, or communities, in their political capacities, as it has been exemplified by the experiment we have made of it, is equally attested by the events which have befallen all other governments of the confederate kind, of which we have any account, in exact proportion to its prevalence in those systems. The confirmations of this fact will be worthy of a distinct and particular examination. I shall content myself with barely observing here that, of all the confederacies of antiquity which history has handed down to us, the Lycian and Achæan leagues, as far as there remain vestiges of them, appear to have been most free from the fetters of that mistaken principle, and were accordingly those which have best

See No. 18.

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deserved, and have most liberally received, the applauding suffrages of political writers.

This exceptionable principle may, as truly as emphatically, be styled the parent of anarchy: it has been seen that delinquencies in the members of the Union are its natural and necessary offspring; and that, whenever they happen, the only constitutional remedy is force, and the immediate effect of the use of it, civil war.

It remains to inquire how far so odious an engine of government, in its application to us, would even be capable of answering its end. If there should not be a large army constantly at the disposal of the national government, it would either not be able to employ force at all, or, when this could be done, it would amount to a war between parts of the Confederacy concerning the infractions of a league, in which the strongest combination would be most likely to prevail, whether it consisted of those who supported or of those who resisted the general authority. It would rarely happen that the delinquency to be redressed would be confined to a single member, and if there were more than one who had neglected their duty, similarity of situation would induce them to unite for common defense. Independent of this motive of sympathy, if a large and influential State should happen to be the aggressing member, it would commonly have weight enough with its neighbors to win over some of them as associates to its cause. Specious arguments of danger to the common liberty could easily be contrived; plausible excuses for the deficiencies of the party could, without difficulty, be invented to alarm the apprehensions, inflame the passions, and conciliate the good-will, even of those States which were not chargeable with any violation or omission of duty. This would be the more likely to take place as the delinquencies of the larger members might be expected sometimes to proceed from an ambitious premeditation in their rulers, with a view to getting rid of all external control upon their designs of personal aggrandizement; the better to effect which it is presumable they would tamper beforehand with lead-

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ing individuals in the adjacent States. If associates could not be found at home, recourse would be had to the aid of foreign powers, who would seldom be disinclined to encouraging the dissensions of a Confederacy from the firm union of which they had so much to fear. When the sword is once drawn, the passions of men observe no bounds of moderation. The suggestions of wounded pride, the instigations of irritated resentment, would be apt to carry the States, against which the arms of the Union were exerted, to any extremes necessary to avenge the affront or to avoid the disgrace of submission. The first war of this kind would probably terminate in a dissolution of the Union.

See note to No. 4.

This may be considered as the violent death of the Confederacy. Its more natural death is what we now seem to be on the point of experiencing, if the federal system be not speedily renovated in a more substantial form. It is not probable, considering the genius of this country, that the complying States would often be inclined to support the authority of the Union by engaging in a war against the non-complying States. They would always be more ready to pursue the milder course of puting themselves upon an equal footing with the delinquent members by an imitation of their example. And the guilt of all would thus become the security of all. Our past experience has exhibited the operation of this spirit in its full light. There would, in fact, be an insuperable difficulty in ascertaining when force could with propriety be employed. In the article of pecuniary contribution, which would be the most usual source of delinquency, it would often be impossible to decide whether it had proceded from disinclination or inability. The pretense of the latter would always be at hand. And the case must be very flagrant in which its fallacy could be detected with sufficient certainty to justify the harsh expedient of compulsion. It is easy to see that this problem alone, as often as it should occur, would open a wide field for the exercise of factious views, of partiality, and of op-

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pression, in the majority that happened to prevail in the national council.

It seems to require no pains to prove that the States ought not to prefer a national Constitution which could only be kept in motion by the instrumentality of a large army, continually on foot to execute the ordinary requisitions or decrees of the government. And yet this is the plain alternative involved by those who wish to deny it the power of extending its operations to individuals. Such a scheme, if practicable at all, would instantly degenerate into a military despotism; but it will be found in every light impracticable. The resources of the Union would not be equal to the maintenance of an army considerable enough to confine the larger States within the limits of their duty; nor would the means ever be furnished of forming such an army in the first instance.[1] Whoever considers the populousness and strength of several of these States singly at the present juncture, and looks forward to what they will become, even at the distance of half a century, will at once dismiss as idle and visionary any scheme which aims at regulating their movements by laws to operate upon them in their collective capacities, and to be executed by a coercion applicable to them in the same capacities. A project of this kind is little less romantic than the monster-taming spirit which is attributed to the fabulous heroes and demi-gods of antiquity.

Even in those confederacies which have been composed of members smaller than many of our counties, the principle of legislation for sovereign States, supported by military coercion, has never been found effectual.[2] It has rarely been attempted to be employed

[1] Yet Saxony and Bavaria were virtually forced to become members of the German Empire, and to this day it is questionable whether, if the head of that Empire, Prussia, were successfully attacked by Russia or France, Bavaria would not once again unite itself with Austria.—EDITOR.

[2] A case not altogether unlike this condition is to be found in Ireland, where troops and a large royal constabulary have with difficulty been able nominally to maintain the laws made for it by Parliament in the last three hundred years.—EDITOR.

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but against the weaker members; and in most instances attempts to coerce the refractory and disobedient have been the signals of bloody wars, in which one half of the confederacy has displayed its banners against the other half.

The result of these observations to an intelligent mind must be clearly this, that if it be possible at any rate to construct a federal government capable of regulating the common concerns and preserving the general tranquillity, it must be founded, as to the objects committed to its care, upon the reverse of the principle contended for by the opponents of the proposed Constitution. It must carry its agency to the persons of the citizens. It must stand in need of no intermediate legislations; but must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions. The majesty of the national authority must be manifested through the medium of the courts of justice. The government of the Union, like that of each State, must be able to address itself immediately to the hopes and fears of individuals; and to attract to its support those passions which have the strongest influence upon the human heart. It must, in short, possess all the means, and have a right to resort to all the methods, of executing the powers with which it is intrusted, that are possessed and exercised by the governments of the particular States.

To this reasoning it may perhaps be objected that, if any State should be disaffected to the authority of the Union, it could at any time obstruct the execution of its laws, and bring the matter to the same issue of force with the necessity of which the opposite scheme is reproached.

The plausibility of this objection will vanish the moment we advert to the essential difference between a mere NON-COMPLIANCE and a DIRECT and ACTIVE RESISTANCE.[1] If the interposition of the State legislatures be

[1] This distinction has been justified to a remarkable degree in history Before the adoption of the federal constitution the states by merely pas-

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necessary to give effect to a measure of the Union, they have only NOT TO ACT or to ACT EVASIVELY, and the measure is defeated. This neglect of duty may be disguised under affected but unsubstantial provisions, so as not to appear, and of course not to excite any alarm in the people for the safety of the Constitution. The State leaders may even make a merit of their surreptitious invasions of it on the ground of some temporary convenience, exemption, or advantage.

But if the execution of the laws of the national government should not require the intervention of the State legislatures, if they were to pass into immediate opera-

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sive action nullified such national laws and even treaties, as they chose; but with the creation of a government acting directly on the people, and therefore requiring active resistance, the attempts to resist the national on the part of the state governments, have been few and have seldom been pushed to open resistance. In the Olmstead case (1809) the governor of Pennsylvania ordered out the militia, and successfully resisted a process of the Supreme Court, and in the Creek and Cherokee troubles (1825–1830), the state of Georgia was equally successful in opposing by force the Court's decrees. It is to be noted, however, that both these nullifications were directed against the judicial department, which necessarily is hampered in its powers by its being compelled to rely upon the officials of another department for an actual enforcement. No attempt of a state government or convention to nullify a law, which was the duty of the executive department to execute, has ever succeeded. In 1798, though Virginia went to the length of purchasing arms, her resistance as a political body to the Alien and Sedition laws was limited to the passing of legislative resolutions; and though in 1832 South Carolina actually embodied troops, the obnoxious tariff laws were never for a moment suspended. A third type of nullification,—the resistance to United States laws, not through the intervention of the state governments, but through popular sentiment,—has succeeded best. For three years the excise law of 1791 was successfully resisted in Western Pennsylvania. (See Hamilton's Works, iii. 575.) The embargo laws of 1808 were successfully resisted in New England, because the local courts and juries would not convict those who broke the law. The Fugitive Slave law was largely nullified in the Northern states, and the attempted enforcement of it must eventually have been abandoned, had the Civil War not intervened. The same difficulty exists to-day in the "moonshine" whisky sections of the South, where it is almost impossible to secure convictions under the national revenue laws, from juries of the locality. The most remarkable incident, however, is furnished by the state of California, where the pressure of public opinion during the Civil War was so strong that the United States greenbacks were never allowed to circulate, despite their being a legal tender, that state remaining on a gold basis throughout the war; and to this day, though the paper money encounters no resistance, the use of it is very uncommon.—EDITOR.

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tion upon the citizens themselves, the particular governments could not interrupt their progress without an open and violent exertion of an unconstitutional power. No omissions nor evasions would answer the end. They would be obliged to act, and in such a manner as would leave no doubt that they had encroached on the national rights. An experiment of this nature would always be hazardous in the face of a constitution in any degree competent to its own defense, and of a people enlightened enough to distinguish between a legal exercise and an illegal usurpation of authority. The success of it would require not merely a factious majority in the legislature, but the concurrence of the courts of justice and of the body of the people. If the judges were not embarked in a conspiracy with the legislature, they would pronounce the resolutions of such a majority to be contrary to the supreme law of the land, unconstitutional and void. If the people were not tainted with the spirit of their State representatives, they, as the natural guardians of the Constitution, would throw their weight into the national scale and give it a decided preponderancy in the contest. Attempts of this kind would not often be made with levity or rashness, because they could seldom be made without danger to the authors, unless in cases of a tyrannical exercise of the federal authority.

If opposition to the national government should arise from the disorderly conduct of refractory or seditious individuals, it could be overcome by the same means which are daily employed against the same evil under the State governments. The magistracy, being equally the ministers of the law of the land, from whatever source it might emanate, would doubtless be as ready to guard the national as the local regulations from the inroads of private licentiousness. As to those partial commotions and insurrections which sometimes disquiet society, from the intrigues of an inconsiderable faction, or from sudden or occasional ill-humors that do not infect the great body of the community, the general government could command more extensive resources for the suppression of

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disturbances of that kind than would be in the power of any single member. And as those mortal feuds which, in certain conjunctures, spread a conflagration through a whole nation, or through a very large proportion of it, proceeding either from weighty causes of discontent given by the government or from the contagion of some violent popular paroxysm, they do not fall within any ordinary rules of calculation. When they happen, they commonly amount to revolutions and dismemberments of empire. No form of government can always either avoid or control them. It is in vain to hope to guard against events too mighty for human foresight or precaution, and it would be idle to object to a government because it could not perform impossibilities.

PUBLIUS.

No. 17. (*Independent Journal*, December 5, 1787.) Hamilton.

REFUTATION OF THE ARGUMENT THAT A GOVERNMENT BASED ON INDIVIDUALS WILL BE TOO POWERFUL.

Unlikelihood that the national government will absorb the residuary authority—Objects of national ambition—Local concerns not alluring objects of general jurisdiction—Easier for the states to encroach on the national authorities—Greater popularity of state government—Tendency of mankind to neighborhood attachment—Local justice the most attractive source of popular obedience and attachment—The national government less immediately connected with the people—Example in feudal times—The struggle between king and baron—Example of clanship in Scotland—State governments compared with feudal baronies—Local governments certain to possess the confidence of the people.

To the People of the State of New York:

An objection of a nature different from that which has been stated and answered in my last address, may perhaps be likewise urged against the principle of legislation for the individual citizens of America. It may be said that it would tend to render the government of the Union too powerful and to enable it to absorb those residuary

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authorities which it might be judged proper to leave with the States for local purposes. Allowing the utmost latitude to the love of power which any reasonable man can require, I confess I am at a loss to discover what temptation the persons intrusted with the administration of the general government could ever feel to divest the States of the authorities of that description. The regulation of the mere domestic police of a State appears to me to hold out slender allurements to ambition. Commerce, finance, negotiation, and war seem to comprehend all the objects which have charms for minds governed by that passion; and all the powers necessary to those objects ought, in the first instance, to be lodged in the national depository. The administration of private justice between the citizens of the same state, the supervision of agriculture[1] and of other concerns of a similar nature—all those things, in short, which are proper to be provided for by local legislation—can never be desirable cares of a general jurisdiction. It is therefore improbable that there should exist a disposition in the federal councils to usurp the powers with which they are connected, because the attempt to exercise those powers would be as troublesome as it would be nugatory; and the possession of them, for that reason, would contribute nothing to the dignity, to the importance, or to the splendor of the national government.

But let it be admitted for argument's sake that mere wantonness and lust of domination would be sufficient to beget that disposition, still it may be safely affirmed that the sense of the constituent body of the national representatives, or, in other words, the people of the several States, would control the indulgence of so extravagant an appetite. It will always be far more easy for the State governments to encroach upon the national authorities, than for the national government to encroach upon the State authorities. The proof of this proposition turns upon the greater degree of influ-

See No. 45.

[1] Hamilton scarcely foresaw the creation of a Department of Agriculture.—EDITOR.

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ence which the State governments, if they administer their affairs with uprightness and prudence, will generally possess over the people; a circumstance which at the same time teaches us that there is an inherent and intrinsic weakness in all federal constitutions, and that too much pains cannot be taken in their organization to give them all the force which is compatible with the principles of liberty.

The superiority of influence in favor of the particular governments would result partly from the diffusive construction of the national government, but chiefly from the nature of the objects to which the attention of the State administrations would be directed.

It is a known fact in human nature that its affections are commonly weak in proportion to the distance or diffusiveness of the object. Upon the same principle that a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large, the people of each State would be apt to feel a stronger bias towards their local governments than towards the government of the Union, unless the force of that principle should be destroyed by a much better administration of the latter.

See No. 25.

This strong propensity of the human heart would find powerful auxiliaries in the objects of State regulation.

The variety of more minute interests, which will necessarily fall under the superintendence of the local administations, and which will form so many rivulets of influence running through every part of the society, cannot be particularized without involving a detail too tedious and uninteresting to compensate for the instruction it might afford.

There is one transcendent advantage belonging to the province of the State governments which alone suffices to place the matter in a clear and satisfactory light—I mean the ordinary administration of criminal and civil justice. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment. It is that which, being the immediate and

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visible guardian of life and property, having its benefits and its terrors in constant activity before the public eye, regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake, contributes more than any other circumstance to impressing upon the minds of the people affection, esteem, and reverence towards the government. This great cement of society, which will diffuse itself almost wholly through the channels of the particular governments, independent of all other causes of influence, would insure them so decided an empire over their respective citizens as to render them at all times a complete counterpoise, and, not unfrequently, dangerous rivals to the power of the Union.

The operations of the national government, on the other hand, falling less immediately under the observation of the mass of the citizens, the benefits derived from it will chiefly be perceived and attended to by speculative men. Relating to more general interests, they will be less apt to come home to the feelings of the people, and, in proportion, less likely to inspire an habitual sense of obligation and an active sentiment of attachment.

The reasoning on this head has been abundantly exemplified by the experience of all federal constitutions with which we are acquainted, and of all others which have borne the least analogy to them.

Though the ancient feudal systems were not, strictly speaking, confederacies, yet they partook of the nature of that species of association. There was a common head, chieftain, or sovereign, whose authority extended over the whole nation; and a number of subordinate vassals or feudatories, who had large portions of land allotted to them, and numerous trains of *inferior* vassals or retainers, who occupied and cultivated that land upon the tenure of fealty or obedience to the persons of whom they held it. Each principal vassal was a kind of sovereign within his particular demesnes. The consequences of this situation were a continual opposition to authority of the sovereign, and frequent wars between the great barons

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or chief feudatories themselves. The power of the head of the nation was commonly too weak, either to preserve the public peace or to protect the people against the oppressions of their immediate lords. This period of European affairs is emphatically styled by historians the times of feudal anarchy.

When the sovereign happened to be a man of vigorous and warlike temper and of superior abilities, he would acquire a personal weight and influence which answered, for the time, the purposes of a more regular authority. But in general, the power of the barons triumphed over that of the prince; and in many instances his dominion was entirely thrown off, and the great fiefs were erected into independent principalities or states. In those instances in which the monarch finally prevailed over his vassals, his success was chiefly owing to the tyranny of those vassals over their dependents. The barons, or nobles, equally the enemies of the sovereign and the oppressors of the common people, were dreaded and detested by both; till mutual danger and mutual interest effected a union between them fatal to the power of the aristocracy. Had the nobles, by a conduct of clemency and justice, preserved the fidelity and devotion of their retainers and followers, the contests between them and the prince must almost always have ended in their favor, and in the abridgment or subversion of the royal authority.

This is not an assertion founded merely in speculation or conjecture. Among other illustrations of its truth which might be cited, Scotland will furnish a cogent example. The spirit of clanship which was, at an early day, introduced into that kingdom, uniting the nobles and their dependents by ties equivalent to those of kindred, rendered the aristocracy a constant overmatch for the power of the monarch, till the incorporation with England subdued its fierce and ungovernable spirit, and reduced it within those rules of subordination which a more rational and more energetic system of civil polity had previously established in the latter kingdom.

The separate governments in a confederacy may aptly be compared with the feudal baronies; with this advantage in their favor, that, from the reasons already explained, they will generally possess the confidence and good will of the people, and with so important a support will be able effectually to oppose all encroachments of the national government. It will be well if they are not

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able to counteract its legitimate and necessary authority. The points of similitude consist in the rivalship of power applicable to both, and in the CONCENTRATION of large portions of the strength of the community into particular DEPOSITS, in one case at the disposal of individuals, in the other case at the disposal of political bodies.

A concise review of the events that have attended confederate governments will further illustrate this important doctrine, an inattention to which has been the great source of our political mistakes, and has given our jealousy a direction to the wrong side. This review shall form the subject of some ensuing papers.

PUBLIUS.

No. 18.[1] (*New York Packet*, Dec. 7, 1787.) Hamilton and Madison.

EXAMPLES OF GREEK CONFEDERACIES.

Amphictyonic council, its powers in history—The Achæan league.

To the People of the State of New York:

Among the confederacies of antiquity, the most considerable was that of the Grecian republics associated under the Amphictyonic council. From the best accounts transmitted of this celebrated institution, it bore a very instruc-

See No. 16.

[1] "'The subject of this and the two following numbers happened to be taken up by both Mr. H. and Mr. M. What had been prepared by Mr. H., who had entered more briefly into the subject, was left with Mr. M. on its appearing that the latter was engaged in it, with larger materials, and with a view to a more precise delineation; and from the pen of the latter, the several papers went to the Press.'"

"The above note from the pen of Mr. Madison was written on the margin of the leaf, commencing with the present number, in the copy of the Federalist loaned by him to the publisher."—*Note in the edition of 1818.*

"No. 18 is attributed to Mr. Hamilton and Mr. Madison jointly. A. H. had drawn up something on the subjects of this (No. 18) and the two next Nos. (19 and 20). On finding that J. M. was engaged in them with larger materials, and with a view to a more precise delineation, he put what he had written into the hands of J. M. It is possible, though not recollected, that something in the draught may have been incorporated

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tive analogy to the present Confederation of the American States.[1]

The members retained the character of independent and sovereign states, and had equal votes in the federal council. This council had a general authority to propose and resolve whatever it judged necessary for the common welfare of Greece; to declare and carry on war; to decide, in the last resort, all controversies between the members; to fine the aggressing party; to employ the whole force of the confederacy against the disobedient; to admit new members. The Amphictyons were the guardians of religion and of the immense riches belonging to the temple of Delphos, where they had the right of jurisdiction in controversies between the inhabitants and those who came to consult the oracle. As a further provision for the efficacy of the federal powers, they took an oath mutually to defend and protect the united cities, to punish the violators of this oath, and to inflict vengeance on sacrilegious despoilers of the temple.

In theory and upon paper, this apparatus of powers seems amply sufficient for all general purposes. In several material instances they exceed the powers enumerated in the articles of confederation. The Amphictyons had in their hands the superstition of the times, one of the principal engines by which government was then maintained; they had a declared authority to use coercion against refractory cities and were bound by oath to exert this authority on the necessary occasions.

Very different, nevertheless, was the experiment from the theory. The powers, like those of the present Congress, were administered

into the numbers as printed; but it was certainly not of a nature or amount to affect the impression left on the mind of J. M., from whose pen the papers went to the press, that they were of the class written by him. As the historic materials of A. H., as far as they went, were doubtless similar or the same with those provided by J. M., and as a like application of them probably occurred to both, an impression might be left on the mind of A. H. that the Nos. in question were written jointly. These remarks are made as well to account for a statement to that effect, if made by A. H., as in justice to J. M., who, always regarding them in a different light, had so stated them to an inquiring friend, long before it was known or supposed that a different impression existed anywhere." Madison's statement in paper entitled *The Federalist*.—EDITOR.

[1] In the "Letters and Other Writings of James Madison," 1865 (i. 293), is printed a paper entitled "Notes of Ancient and Modern Confederacies," and from that paper the following accounts were drawn. The history of the Greek confederacies is told at length in E. A. Freeman's "History of Federal Government from the Foundation of the Achaian League to the Disruption of the United States," a work which, for obvious reasons, was never completed.—EDITOR.

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by deputies appointed wholly by the cities in their political capacities, and exercised over them in the same capacities. Hence the weakness, the disorders, and finally the destruction of the confederacy. The more powerful members, instead of being kept in awe and subordination, tyrannized successively over all the rest. Athens, as we learn from Demosthenes, was the arbiter of Greece seventy-three years. The Lacedæmonians next governed it twenty-nine years; at a subsequent period, after the battle of Leuctra, the Thebans had their turn of domination.

It happened but too often, according to Plutarch, that the deputies of the strongest cities awed and corrupted those of the weaker, and that judgment went in favor of the most powerful party.

Even in the midst of defensive and dangerous wars with Persia and Macedon, the members never acted in concert, and were, more or fewer of them, eternally the dupes or the hirelings of the common enemy. The intervals of foreign war were filled up by domestic vicissitudes, convulsions, and carnage.

After the conclusion of the war with Xerxes, it appears that the Lacedæmonians required that a number of the cities should be turned out of the confederacy for the unfaithful part they had acted. The Athenians, finding that the Lacedæmonians would lose fewer partisans by such a measure than themselves, and would become masters of the public deliberations, vigorously opposed and defeated the attempt. This piece of history proves at once the inefficiency of the union, the ambition and jealousy of its most powerful members, and the dependent and degraded condition of the rest. The smaller members, though entitled by the theory of their system to revolve in equal pride and majesty around the common center, had become, in fact, satellites of the orbs of primary magnitude.

Had the Greeks, says the Abbé Milot, been as wise as they were courageous, they would have been admonished by experience of the necessity of a closer union, and would have availed themselves of the peace which followed their success against the Persian arms, to establish such a reformation. Instead of this obvious policy, Athens and Sparta, inflated with the victories and the glory they had acquired, became first rivals and then enemies, and did each other infinitely more mischief than they had suffered from Xerxes. Their mutual jealousies, fears, hatreds, and injuries ended in the celebrated Peloponnesian war, which itself ended in the ruin and slavery of the Athenians who had begun it.

As a weak government, when not at war, is ever agitated by

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internal dissensions, so these never fail to bring on fresh calamities from abroad. The Phocians having plowed up some consecrated ground belonging to the temple of Apollo, the Amphictyonic council, according to the superstition of the age, imposed a fine on the sacrilegious offenders. The Phocians, being abetted by Athens and Sparta, refused to submit to the decree. The Thebans, with others of the cities, undertook to maintain the authority of the Amphictyons, and to avenge the violated god. The latter, being the weaker party, invited the assistance of Philip of Macedon, who had secretly fostered the contest. Philip gladly seized the opportunity of executing the designs he had long planned against the liberties of Greece. By his intrigues and bribes he won over to his interests the popular leaders of several cities; by their influence and votes gained admission into the Amphictyonic council; and by his arts and his arms made himself master of the confederacy.

Such were the consequences of the fallacious principle on which this interesting establishment was founded. Had Greece, says a judicious observer on her fate, been united by a stricter confederation, and persevered in her union, she would never have worn the chains of Macedon, and might have proved a barrier to the vast projects of Rome.

The Achæan league, as it is called, was another society of Grecian republics which supplies us with valuable instruction.

The union here was far more intimate, and its organization much wiser than in the preceding instance. It will accordingly appear that, though not exempt from a similar catastrophe, it by no means equally deserved it.

The cities composing this league retained their municipal jurisdiction, appointed their own officers, and enjoyed a perfect equality. The senate, in which they were represented, had the sole and exclusive right of peace and war; of sending and receiving ambassadors; of entering into treaties and alliances; of appointing a chief magistrate or prætor, as he was called, who commanded their armies, and who, with the advice and consent of ten of the senators, not only administered the government in the recess of the senate, but had a great share in its deliberations, when assembled. According to the primitive constitution, there were two prætors associated in the administration; but on trial a single one was preferred.

It appears that the cities had all the same laws and customs, the same weights and measures, and the same money. But how far this effect proceeded from the authority of the federal council is

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left in uncertainty. It is said only that the cities were in a manner compelled to receive the same laws and usages. When Lacedæmon was brought into the league by Philopœmen, it was attended with an abolition of the institutions and laws of Lycurgus, and an adoption of those of the Achæans. The Amphictyonic confederacy, of which she had been a member, left her in the full exercise of her government and her legislation. This circumstance alone proves a very material difference in the genius of the two systems.

It is much to be regretted that such imperfect monuments remain of this curious political fabric. Could its interior structure and regular operation be ascertained, it is probable that more light would be thrown by it on the science of federal government than by any of the like experiments with which we are acquainted.

One important fact seems to be witnessed by all the historians who take notice of Achæan affairs. It is that, as well after the renovation of the league by Aratus as before its dissolution by the arts of Macedon, there was infinitely more of moderation and justice in the administration of its government, and less of violence and sedition in the people, than were to be found in any of the cities exercising *singly* all the prerogatives of sovereignty. The Abbé Mably, in his observations on Greece, says that the popular government, which was so tempestuous elsewhere, caused no disorders in the members of the Achæan republic, *because it was there tempered by the general authority and laws of the confederacy*.

We are not to conclude too hastily, however, that faction did not, in a certain degree, agitate the particular cities; much less that a due subordination and harmony reigned in the general system. The contrary is sufficiently displayed in the vicissitudes and fate of the republic.

Whilst the Amphictyonic confederacy remained, that of the Achæans, which comprehended the less important cities only, made little figure on the theater of Greece. When the former became a victim to Macedon, the latter was spared by the policy of Philip and Alexander. Under the successors of these princes, however, a different policy prevailed. The arts of division were practiced among the Achæans. Each city was seduced into a separate interest; the union was dissolved. Some of the cities fell under the tyranny of Macedonian garrisons; others under that of usurpers springing out of their own confusions. Shame and oppression erelong awakened their love of liberty. A few cities reunited. Their example was followed by others, as opportunities were found of cutting off their tyrants. The league soon embraced

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almost the whole Peloponnesus. Macedon saw its progress, but was hindered by internal dissensions from stopping it. All Greece caught the enthusiasm and seemed ready to unite in one confederacy, when the jealousy and envy in Sparta and Athens, of the rising glory of the Achæans, threw a fatal damp on the enterprise. The dread of the Macedonian power induced the league to court the alliance of the kings of Egypt and Syria, who, as successors of Alexander, were rivals of the king of Macedon. This policy was defeated by Cleomenes, king of Sparta, who was led by his ambition to make an unprovoked attack on his neighbors, the Achæans, and who, as an enemy to Macedon, had interest enough with the Egyptian and Syrian princes to effect a breach of their engagements with the league. The Achæans were now reduced to the dilemma of submitting to Cleomenes, or of supplicating the aid of Macedon, its former oppressor. The latter expedient was adopted. The contests of the Greeks always afforded a pleasing opportunity to that powerful neighbor of intermeddling in their affairs. A Macedonian army quickly appeared. Cleomenes was vanquished. The Achæans soon experienced, as often happens, that a victorious and powerful ally is but another name for a master. All that their most abject compliances could obtain from him was a toleration of the exercise of their laws. Philip, who was now on the throne of Macedon, soon provoked by his tyrannies fresh combinations among the Greeks. The Achæans, though weakened by internal dissensions, and by the revolt of Messene, one of its members, being joined by the Ætolians and Athenians, erected the standard of opposition. Finding themselves, though thus supported, unequal to the undertaking, they once more had recourse to the dangerous expedient of introducing the succor of foreign arms. The Romans, to whom the invitation was made, eagerly embraced it. Philip was conquered; Macedon subdued. A new crisis ensued to the league. Dissensions broke out among its members. These the Romans fostered. Callicrates and other popular leaders became mercenary instruments for inveigling their countrymen. The more effectually to nourish discord and disorder the Romans had, to the astonishment of those who confided in their sincerity, already proclaimed universal liberty* throughout Greece. With the same insidious views, they now seduced the members from the league, by representing to their pride the violation it committed on their sovereignty. By these arts this union, the last hope of Greece, the last hope of ancient liberty, was torn into pieces, and such imbe-

* This was but another name more specious for the independence of the members on the federal head.—PUBLIUS.

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cility and distraction introduced, that the arms of Rome found little difficulty in completing the ruin which their arts had commenced. The Achæans were cut to pieces, and Achaia loaded with chains, under which it is groaning at this hour.

I have thought it not superfluous to give the outlines of this important portion of history; both because it teaches more than one lesson, and because, as a supplement to the outlines of the Achæan constitution, it emphatically illustrates the tendency of federal bodies rather to anarchy among the members, than to tyranny in the head. PUBLIUS.

No. 19. (*Independent Journal*, Dec. 8, 1787.) Hamilton and Madison.

EXAMPLES OF MEDIÆVAL AND MODERN CONFEDERACIES.

The German empire—Example of Poland—The Swiss confederacy.

To the People of the State of New York:

The examples of ancient confederacies, cited in my last paper, have not exhausted the source of experimental instruction on this subject. There are existing institutions, founded on a similar principle, which merit particular consideration. The first which presents itself is the Germanic body.

In the early ages of Christianity, Germany was occupied by seven distinct nations, who had no common chief. The Franks, one of the number, having conquered the Gauls, established the kingdom which has taken its name from them. In the ninth century, Charlemagne, its warlike monarch, carried his victorious arms in every direction, and Germany became a part of his vast dominions. On the dismemberment, which took place under his sons, this part was erected into a separate and independent empire. Charlemagne and his immediate descendants possessed the reality, as well as the ensigns and dignity of imperial power. But the principal vassals, whose fiefs had become hereditary, and who composed the national diets which Charlemagne had not abolished, gradually threw off the yoke and advanced to sovereign jurisdiction and independence. The force of imperial sovereignty was insufficient to restrain such powerful dependents, or to preserve the unity and tranquillity of the empire. The most

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furious private wars, accompanied with every species of calamity, were carried on between the different princes and states. The imperial authority, unable to maintain the public order, declined by degrees till it was almost extinct in the anarchy which agitated the long interval between the death of the last emperor of the Suabian, and the accession of the first emperor of the Austrian lines. In the eleventh century the emperors enjoyed full sovereignty; in the fifteenth they had little more than the symbols and decorations of power.

Out of this feudal system, which has itself many of the important features of a confederacy, has grown the federal system which constitutes the Germanic empire. Its powers are vested in a diet representing the component members of the confederacy: in the emperor, who is the executive magistrate, with a negative on the decrees of the diet; and in the imperial chamber, and the aulic council, two judiciary tribunals having supreme jurisdiction in controversies which concern the empire, or which happen among its members.

The diet possesses the general power of legislating for the empire; of making war and peace; contracting alliances; assessing quotas of troops and money; constructing fortresses; regulating coin; admitting new members; and subjecting disobedient members to the ban of the empire, by which the party is degraded from his sovereign rights and his possessions forfeited. The members of the confederacy are expressly restricted from entering into compacts prejudicial to the empire; from imposing tolls and duties on their mutual intercourse, without the consent of the emperor and diet; from altering the value of money; from doing injustice to one another; or from affording assistance or retreat to disturbers of the public peace. And the ban is denounced against such as shall violate any of these restrictions. The members of the diet, as such, are subject in all cases to be judged by the emperor and diet, and in their private capacities by the aulic council and imperial chamber.

The prerogatives of the emperor are numerous. The most important of them are: his exclusive right to make propositions to the diet; to negative its resolutions; to name ambassadors; to confer dignities and titles; to fill vacant electorates; to found universities; to grant privileges not injurious to the states of the empire; to receive and apply the public revenues; and generally to watch over the public safety. In certain cases, the electors form a council to him. In quality of emperor, he possesses no territory within the empire, nor receives any revenue for his support.

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But his revenue and dominions, in other qualities, constitute him one of the most powerful princes in Europe.

From such a parade of constitutional powers, in the representatives and head of this confederacy, the natural supposition would be that it must form an exception to the general character which belongs to its kindred systems. Nothing would be further from the reality. The fundamental principle on which it rests, that the empire is a community of sovereigns, that the diet is a representation of sovereigns, and that the laws are addressed to sovereigns, renders the empire a nerveless body, incapable of regulating its own members, insecure against external dangers, and agitated with unceasing fermentations in its own bowels.

The history of Germany is a history of wars between the emperor and the princes and states; of wars among the princes and states themselves; of the licentiousness of the strong, and the oppression of the weak; of foreign intrusions, and foreign intrigues; of requisitions of men and money disregarded, or partially complied with; of attempts to enforce them, altogether abortive, or attended with slaughter and desolation, involving the innocent with the guilty; of general imbecility, confusion, and misery.

In the sixteenth century, the emperor, with one part of the empire on his side, was seen engaged against the other princes and states. In one of the conflicts, the emperor himself was put to flight and very near being made prisoner by the elector of Saxony. The late king of Prussia was more than once pitted against his imperial sovereign; and commonly proved an overmatch for him. Controversies and wars among the members themselves have been so common that the German annals are crowded with the bloody pages which describe them. Previous to the peace of Westphalia, Germany was desolated by a war of thirty years, in which the emperor, with one half of the empire, was on one side, and Sweden, with the other half, on the opposite side. Peace was at length negotiated, and dictated by foreign powers; and the articles of it, to which foreign powers are parties, made a fundamental part of the Germanic constitution.

If the nation happens, on any emergency, to be more united by the necessity of self-defense, its situation is still deplorable. Military preparations must be preceded by so many tedious discussions, arising from the jealousies, pride, separate views, and clashing pretensions of sovereign bodies, that before the diet can settle the arrangements, the enemy are in the field; and before the federal troops are ready to take it, are retiring into winter quarters.

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The small body of national troops, which has been judged necessary in time of peace, is defectively kept up, badly paid, infected with local prejudices, and supported by irregular and disproportionate contributions to the treasury.

The impossibility of maintaining order and dispensing justice among these sovereign subjects produced the experiment of dividing the empire into nine or ten circles or districts; of giving them an interior organization, and of charging them with the military execution of the laws against delinquent and contumacious members. This experiment has only served to demonstrate more fully the radical vice of the constitution. Each circle is the miniature picture of the deformities of this political monster. They either fail to execute their commissions, or they do it with all the devastation and carnage of civil war. Sometimes whole circles are defaulters; and then they increase the mischief which they were instituted to remedy.

We may form some judgment of this scheme of military coercion from a sample given by Thuanus. In Donawerth, a free and imperial city of the circle of Suabia, the Abbé de St. Croix enjoyed certain immunities which had been reserved to him. In the exercise of these, on some public occasions, outrages were committed on him by the people of the city. The consequence was that the city was put under the ban of the empire, and the Duke of Bavaria, though director of another circle, obtained an appointment to enforce it. He soon appeared before the city with a corps of ten thousand troops, and finding it a fit occasion, as he had secretly intended from the beginning, to revive an antiquated claim, on the pretext that his ancestors had suffered the place to be dismembered from his territory,* he took possession of it in his own name, disarmed and punished the inhabitants, and reannexed the city to his domains.

It may be asked, perhaps, what has so long kept this disjointed machine from falling entirely to pieces? The answer is obvious. The weakness of most of the members, who are unwilling to expose themselves to the mercy of foreign powers; the weakness of most of the principal members, compared with the formidable powers all around them; the vast weight and influence which the emperor derives from his separate and hereditary dominions; and the interest he feels in preserving a system with which his family pride is connected, and which constitutes him the first prince in

* Pfeffel, "Nouvel Abrég. Chronol. de l'Hist., etc., d'Allemagne," says the pretext was to indemnify himself for the expense of the expedition.—PUBLIUS.

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Europe;—these causes support a feeble and precarious Union; whilst the repellent quality incident to the nature of sovereignty, and which time continually strengthens, prevents any reform whatever, founded on a proper consolidation. Nor is it to be imagined, if this obstacle could be surmounted, that the neighboring powers would suffer a revolution to take place, which would give to the empire the force and pre-eminence to which it is entitled. Foreign nations have long considered themselves as interested in the changes made by events in this constitution; and have, on various occasions, betrayed their policy of perpetuating its anarchy and weakness.

If more direct examples were wanting, Poland, as a government over local sovereigns, might not improperly be taken notice of. Nor could any proof more striking be given of the calamities flowing from such institutions. Equally unfit for self-government and self-defense, it has long been at the mercy of its powerful neighbors; who have lately had the mercy to disburden it of one-third of its people and territories.

The connection among the Swiss cantons scarcely amounts to a confederacy; though it is sometimes cited as an instance of the stability of such institutions.

They have no common treasury; no common troops even in war; no common coin; no common judicatory, nor any other common mark of sovereignty.

They are kept together by the peculiarity of their topographical position; by their individual weakness and insignificancy; by the fear of powerful neighbors, to one of which they were formerly subject; by the few sources of contention among a people of such simple and homogeneous manners; by their joint interest in their dependent possessions; by the mutual aid they stand in need of, for suppressing insurrections and rebellions, an aid expressly stipulated, and often required and afforded; and by the necessity of some regular and permanent provision for accommodating disputes among the cantons. The provision is, that the parties at variance shall each choose four judges out of the neutral cantons, who, in case of disagreement, choose an umpire. This tribunal, under an oath of impartiality, pronounces definitive sentence which all the cantons are bound to enforce. The competency of this regulation may be estimated by a clause in their treaty of 1683, with Victor Amadeus of Savoy, in which he obliges himself to interpose as mediator in disputes between the cantons, and to employ force, if necessary, against the contumacious party.

So far as the peculiarity of their case will admit of comparison

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with that of the United States, it serves to confirm the principle intended to be established. Whatever efficacy the union may have had in ordinary cases, it appears that the moment a cause of difference sprang up, capable of trying its strength, it failed. The controversies on the subject of religion, which in three instances have kindled violent and bloody contests, may be said, in fact, to have severed the league. The Protestant and Catholic cantons have since had their separate diets, where all the most important concerns are adjusted, and which have left the general diet little other business than to take care of the common bailages.

That separation had another consequence which merits attention. It produced opposite alliances with foreign powers: of Berne, at the head of the Protestant association, with the United Provinces; and of Luzerne, at the head of the Catholic association, with France. PUBLIUS.

No. 20. (*New York Packet*, Dec. 11, 1787.) Hamilton and Madison.

EXAMPLE OF THE UNITED NETHERLANDS.

Nature of government—Historical illustrations—The present condition.

To the People of the State of New York:

The United Netherlands are a confederacy of republics, or rather of aristocracies of a very remarkable texture, yet confirming all the lessons derived from those which we have already reviewed.

The union is composed of seven coequal and sovereign states, and each state or province is a composition of equal and independent cities. In all important cases, not only the provinces but the cities must be unanimous.

The sovereignty of the union is represented by the States-General, consisting usually of about fifty deputies appointed by the provinces. They hold their seats, some for life, some for six, three, and one years; from two provinces they continue in appointment during pleasure.

The States-General have authority to enter into treaties and alliances; to make war and peace: to raise armies and equip fleets; to ascertain quotas and demand contributions. In all these cases, however, unanimity and the sanction of their con-

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stituents are requisite. They have authority to appoint and receive ambassadors; to execute treaties and alliances already formed; to provide for the collection of duties on imports and exports; to regulate the mint, with a saving to the provincial rights; to govern as sovereigns the dependent territories. The provinces are restrained, unless with the general consent, from entering into foreign treaties; from establishing imposts injurious to others, or charging their neighbors with higher duties than their own subjects. A council of state, a chamber of accounts, with five colleges of admiralty, aid and fortify the federal administration.

The executive magistrate of the union is the Stadtholder, who is now an hereditary prince. His principal weight and influence in the republic are derived from this independent title; from his great patrimonial estates; from his family connections with some of the chief potentates of Europe; and, more than all, perhaps, from his being stadtholder in the several provinces, as well as for the union; in which provincial quality he has the appointment of town magistrates under certain regulations, executes provincial decrees, presides—when he pleases—in the provincial tribunals, and has throughout the power of pardon.

As Stadtholder of the union, he has, however, considerable prerogatives.

In his political capacity he has authority to settle disputes between the provinces, when other methods fail; to assist at the deliberations of the States-General, and at their particular conferences; to give audiences to foreign ambassadors, and to keep agents for his particular affairs at foreign courts.

In his military capacity he commands the federal troops, provides for garrisons, and in general regulates military affairs; disposes of all appointments, from colonels to ensigns, and of the governments and posts of fortified towns.

In his marine capacity he is Admiral General, and superintends and directs everything relative to naval forces and other naval affairs; presides in the admiralties in person or by proxy; appoints lieutenant admirals and other officers; and establishes councils of war, whose sentences are not executed till he approves them.

His revenue, exclusive of his private income, amounts to three hundred thousand florins. The standing army which he commands consists of about forty thousand men.

Such is the nature of the celebrated Belgic confederacy, as delineated on parchment. What are the characters which practice has stamped upon it? Imbecility in the government; discord

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among the provinces; foreign influence and indignities; a precarious existence in peace, and peculiar calamities from war.

It was long ago remarked by Grotius that nothing but the hatred of his countrymen to the House of Austria kept them from being ruined by the vices of their constitution.

The union of Utrecht, says another respectable writer, reposes an authority in the States-General, seemingly sufficient to secure harmony, but the jealousy in each province renders the practice very different from the theory.

The same instrument, says another, obliges each province to levy certain contributions; but this article never could, and probably never will be executed, because the inland provinces, who have little commerce, cannot pay an equal quota.

In matters of contribution, it is the practice to waive the articles of the constitution. The danger of delay obliges the consenting provinces to furnish their quotas without waiting for the others, and then to obtain reimbursement from the others by deputations which are frequent, or otherwise, as they can. The great wealth and influence of the province of Holland enable her to effect both these purposes.

It has more than once happened that the deficiencies had to be ultimately collected at the point of the bayonet; a thing practicable, though dreadful, in a confederacy where one of the members exceeds in force all the rest, and where several of them are too small to meditate resistance; but utterly impracticable in one composed of members several of which are equal to each other in strength and resources, and equal singly to a vigorous and persevering defense.

Foreign ministers, says Sir William Temple, who was himself a foreign minister, elude matters taken *ad referendum*, by tampering with the provinces and cities. In 1726 the treaty of Hanover was delayed by these means a whole year. Instances of a like nature are numerous and notorious.

In critical emergencies the States-General are often compelled to overleap their constitutional bounds. In 1688 they concluded a treaty of themselves at the risk of their heads. The treaty of Westphalia, in 1648, by which their independence was formally and finally recognized, was concluded without the consent of Zealand. Even as recently as the last treaty of peace with Great Britain, the constitutional principle of unanimity was departed from. A weak constitution must necessarily terminate in dissolution, for want of proper powers, or the usurpation of powers requisite for the public safety. Whether the usurpation, when

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once begun, will stop at the salutary point, or go forward to the dangerous extreme, must depend on the contingencies of the moment. Tyranny has perhaps oftener grown out of the assumptions of power, called for, on pressing exigencies, by a defective constitution, than out of the full exercise of the largest constitutional authorities.

Notwithstanding the calamities produced by the Stadtholdership, it has been supposed that without his influence in the individual provinces, the causes of anarchy manifest in the confederacy would long ago have dissolved it. "Under such a government," says the Abbé Mably, "the union could never have subsisted, if the provinces had not a spring within themselves, capable of quickening their tardiness, and compelling them to the same way of thinking. This spring is the Stadtholder." It is remarked by Sir William Temple, "that in the intermissions of the Stadtholdership, Holland, by her riches and her authority, which drew the others into a sort of dependence, supplied the place."

These are not the only circumstances which have controlled the tendency to anarchy and dissolution. The surrounding powers impose an absolute necessity of union to a certain degree, at the same time that they nourish by their intrigues the constitutional vices which keep the republic in some degree always at their mercy.

The true patriots have long bewailed the fatal tendency of these vices, and have made no less than four regular experiments by *extraordinary assemblies*, convened for the special purpose, to apply a remedy. As many times has their laudable zeal found it impossible to *unite the public councils* in reforming the known, the acknowledged, the fatal evils of the existing constitution. Let us pause, my fellow-citizens, for one moment, over this melancholy and monitory lesson of history; and, with the tear that drops for the calamities brought on mankind by their adverse opinions and selfish passions, let our gratitude mingle an ejaculation to Heaven for the propitious concord which has distinguished the consultations for our political happiness.

A design was also conceived of establishing a general tax to be administered by the federal authority. This also had its adversaries and failed.

This unhappy people seem to be now suffering from popular convulsions, from dissensions among the States, and from the actual invasion of foreign arms, the crisis of their destiny. All nations have their eyes fixed on the awful spectacle. The first wish prompted by humanity is that this severe trial may issue in

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such a revolution of their government as will establish their union, and render it the parent of tranquillity, freedom, and happiness; the next, that the asylum under which, we trust, the enjoyment of these blessings will speedily be secured in this country, may receive and console them for the catastrophe of their own.

I make no apology for having dwelt so long on the contemplation of these federal precedents. Experience is the oracle of truth; and where its responses are unequivocal, they ought to be conclusive and sacred. The important truth, which it unequivocally pronounces in the present case, is that a sovereignty over sovereigns, a government over governments, a legislation for communities as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity, by substituting *violence* in place of *law*, or the destructive *coercion* of the *sword* in place of the mild and salutary *coercion* of the *magistracy*. PUBLIUS.

No. 21. (*Independent Journal*, December 12, 1787.) Hamilton.

SPECIFIC DEFECTS IN THE CONFEDERATION.

No sanction of laws—No mutual guaranty of state governments—Dangerous possibility of despotism—Advantages of a national guaranty—System of quotas and its unfairness—Difficulty in finding a basis of taxation—Comparison between the states in respect to wealth—Complex sources of wealth and taxable ability—Inequality of taxation sure to destroy Union—The national government must raise its own revenues—Tendency of taxation to distribute itself—Taxes on articles of consumption prescribe their own limit—Distinction between indirect and direct taxes—Difficulties involved with direct taxes.

To the People of the State of New York:

Having in the three last numbers taken a summary review of the principal circumstances and events which have depicted the genius and fate of other confederate governments, I shall now proceed in the enumeration of the most important of those defects which have hitherto disappointed our hopes from the system established among ourselves. To form a safe and satisfactory judgment of the proper remedy, it is absolutely

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necessary that we should be well acquainted with the extent and malignity of the disease.

The next most palpable defect of the subsisting Confederation is the total want of a SANCTION to its laws. The United States, as now composed, have no powers to exact obedience, or punish disobedience to their resolutions, either by pecuniary mulcts, by a suspension or divestiture of privileges, or by any other constitutional mode. There is no express delegation of authority to them to use force against delinquent members; and if such a right should be ascribed to the federal head, as resulting from the nature of the social compact between the States, it must be by inference and construction, in the face of that part of the second article, by which it is declared, "that each State shall retain every power, jurisdiction, and right, not *expressly* delegated to the United States in Congress assembled." There is, doubtless, a striking absurdity in supposing that a right of this kind does not exist, but we are reduced to the dilemma either of embracing that supposition, preposterous as it may seem, or of contravening or explaining away a provision which has been of late a repeated theme of the eulogies of those who oppose the new Constitution; and the want of which in that plan, has been the subject of much plausible animadversion and severe criticism. If we are unwilling to impair the force of this applauded provision, we shall be obliged to conclude that the United States afford the extraordinary spectacle of a government destitute even of the shadow of constitutional power to enforce the execution of its own laws. It will appear, from the specimens which have been cited, that the American Confederacy, in this particular, stands discriminated from every other institution of a similar kind, and exhibits a new and unexampled phenomenon in the political world.

The want of a mutual guaranty of the State governments is another capital imperfection in the federal plan. There is nothing of this kind declared in the articles that

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compose it; and to imply a tacit guaranty from considerations of utility would be a still more flagrant departure from the clause which has been mentioned, than to imply a tacit power of coercion from the like considerations. The want of a guaranty, though it might in its consequences endanger the Union, does not so immediately attack its existence as the want of a constitutional sanction to its laws.[1]

Without a guaranty the assistance to be derived from the Union in repelling those domestic dangers which may sometimes threaten the existence of the State constitutions, must be renounced. Usurpation may rear its crest in each State, and trample upon the liberties of the people, while the national government could legally do nothing more than behold its encroachments with indignation and regret. A successful faction may erect a tyranny on the ruins of order and law, while no succor could constitutionally be afforded by the Union to the friends and supporters of the government. The tempestuous situation from which Massachusetts has scarcely emerged evinces that dangers of this kind are not merely speculative. Who can determine what might have been the issue of her late convulsions, if the malcontents had been headed by a Cæsar or by a Cromwell? Who can predict what effect a despotism, established in Massachusetts, would have upon the liberties of New Hampshire or Rhode Island, of Connecticut or New York?

See No. 6.

The inordinate pride of State importance has suggested to some minds an objection to the principle of a guaranty in the federal government, as involving an officious interference in the domestic concerns of the members. A scruple of this kind would deprive us of one of the principal advantages to be expected from union, and can only flow from a misapprehension of the

[1] The Congress of the Confederation had taken one step toward such a guaranty by inserting in the Ordinance for the Government of the North-West Territory, a clause guaranteeing a republican government to the states to be formed out of that section.—EDITOR.

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nature of the provision itself. It could be no impediment to reforms of the State constitutions by a majority of the people in a legal and peaceable mode. This right would remain undiminished. The guaranty could only operate against changes to be effected by violence. Toward the prevention of calamities of this kind, too many checks cannot be provided. The peace of society and the stability of government depend absolutely on the efficacy of the precautions adopted on this head. Where the whole power of the government is in the hands of the people, there is the less pretense for the use of violent remedies in partial or occasional distempers of the State. The natural cure for an ill-administration, in a popular or representative constitution, is a change of men. A guaranty by the national authority would be as much leveled against the usurpations of rulers as against the ferments and outrages of faction and sedition in the community.

The principle of regulating the contributions of the States to the common treasury by QUOTAS is another fundamental error in the Confederation. Its repugnancy to an adequate supply of the national exigencies has been already pointed out, and has sufficiently appeared from the trial which has been made of it.[1] I speak of it now solely with a view to equality among the

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[1] The history of the results of the quota system was sketched by Hamilton, in his speech on the Report, as follows:

"The universal delinquency of the States during the war shall be passed over with the bare mention of it. The public embarrassments were a plausible apology for that delinquency; and it was hoped the peace would have produced greater punctuality. The experiment has disappointed that hope to a degree which confounds the least sanguine. A comparative view of the compliances of the several States for the five last years will furnish a striking result.

"During that period, as appears by a statement on our files, New Hampshire, North Carolina, South Carolina, and Georgia have paid nothing. I say nothing, because the only actual payment is the trifling sum of about seven thousand dollars by New Hampshire. South Carolina indeed has credits, but these are merely by way of discount on the supplies furnished by her during the war, in consideration of her peculiar sufferings and exertions while the immediate theater of it.

"Connecticut and Delaware have paid about one-third of their requisitions; Massachusetts, Rhode Island, and Maryland, about one-half;

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States. Those who have been accustomed to contemplate the circumstances which produce and constitute national wealth, must be satisfied that there is no common standard or barometer by which the degrees of it can be ascertained. Neither the value of lands nor the numbers of the people, which have been successively proposed as the rule of State contributions, has any pretension to being a just representative. If we compare the wealth of the United Netherlands with that of Russia or Germany, or even of France, and if we at the same time compare the total value of the lands and the aggregate population of that contracted district with the total value of the lands and the aggregate population of the immense regions of either of the three last-mentioned countries, we shall at once discover that there is no comparison between the proportion of either of these two objects and that of the relative wealth of those

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Virginia about three-fifths; Pennsylvania nearly the whole; and New York more than her quota.

"These proportions are taken on the specie requisitions; the indents have been very partially paid, and in their present state are of little account.

"The payments into the Federal treasury have declined rapidly each year. The whole amount for three years past, in specie, has not exceeded $1,400,000, of which New York has paid one hundred per cent. more than her proportion. This sum, little more than $400,000 a year, it will readily be conceived, has been exhausted in the support of the civil establishments of the Union and the necessary guards and garrisons of public arsenals, and on the frontiers; without any surplus for paying any part of the debt, foreign or domestic, principal or interest.

"Things are continually growing worse; the last year in particular produced less than $200,000, and that from only two or three States. Several of the States have been so long unaccustomed to pay, that they seem no longer concerned even about the appearances of compliance.

"Connecticut and New Jersey have almost formally declined paying any longer. The ostensible motive is the non-concurrence of this State in the impost system. The real one must be conjectured from the fact.

"Pennsylvania, if I understand the scope of some late resolutions, means to discount the interest she pays upon her assumption to her own citizens; in which case there will be little coming from her to the United States. This seems to be bringing matters to a crisis.

"The pecuniary support of the federal government has of late devolved almost entirely upon Pennsylvania and New York. If Pennsylvania refuses to continue her aid, what will be the situation of New York? Are we willing to be the Atlas of the Union? or are we willing to see it perish?"—EDITOR.

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nations. If the like parallel were to be run between several of the American States, it would furnish a like result. Let Virginia be contrasted with North Carolina, Pennsylvania with Connecticut, or Maryland with New Jersey, and we shall be convinced that the respective abilities of those States, in relation to revenue, bear little or no analogy to their comparative stock in lands or to their comparative population. The position may be equally illustrated by a similar process between the counties of the same State. No man who is acquainted with the State of New York will doubt that the active wealth of Kings County bears a much greater proportion to that of Montgomery, than it would appear to be if we should take either the total value of the lands or the total number of the people as a criterion!

The wealth of nations depends upon an infinite variety of causes. Situation, soil, climate, the nature of the productions, the nature of the government, the genius of the citizens, the degree of information they possess, the state of commerce, of arts, of industry—these circumstances and many more, too complex, minute, or adventitious to admit of a particular specification, occasion differences hardly conceivable in the relative opulence and riches of different countries. The consequence clearly is that there can be no common measure of national wealth, and, of course, no general or stationary rule by which the ability of a State to pay taxes can be determined. The attempt, therefore, to regulate the contributions of the members of a confederacy by any such rule cannot fail to be productive of glaring inequality and extreme oppression.

This inequality would of itself be sufficient in America to work the eventual destruction of the Union, if any mode of enforcing a compliance with its requisitions could be devised.[1] The suffering States would not long

[1] An example of this truth was the attempted nullification by South Carolina of the protective tariff of 1832, which from her point of view placed unfair burdens on the South for the benefit of the North. More

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consent to remain associated upon a principle which distributes the public burdens with so unequal a hand, and which was calculated to impoverish and oppress the citizens of some States, while those of others would scarcely be conscious of the small proportion of the weight they were required to sustain. This, however, is an evil inseparable from the principle of quotas and requisitions.

There is no method of steering clear of this inconvenience, but by authorizing the national government to raise its own revenues in its own way. Imposts, excises, and, in general, all duties upon articles of consumption, may be compared to a fluid which will, in time, find its level with the means of paying them. The amount to be contributed by each citizen will in a degree be at his own option, and can be regulated by an attention to his resources. The rich may be extravagant, the poor can be frugal; and private oppression may always be avoided by a judicious selection of objects proper for such impositions. If inequalities should arise in some States from duties on particular objects, these will, in all probability, be counterbalanced by proportional inequalities in other States from the duties on other objects. In the course of time and things, an equilibrium, as far as it is attainable in so complicated a subject, will be established everywhere. Or if inequalities should still exist, they would neither be so great in their degree, so uniform in their operation, nor so odious in their appearance, as those which would necessarily spring from quotas, upon any scale that can possibly be devised.

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recently, the East was almost as unanimous in opposing what it deemed an endeavor of the West and South to shift an undue share of taxation upon the former section, in the income tax, and though resistance to the law was only openly shown in the courts, there can be no doubt that a large portion of those who were liable to pay the tax were quite as determined to nullify the law by evasions or actual falsification, as the South Carolinians were in 1832, the sole difference being in the change of methods made necessary by the intervening years. Both incidents go to show how absolutely futile it is for one section to seek to impose discriminating burdens on another, for it must end either in evasion of the law, in eventual compromise, or in attempted separation.—EDITOR.

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It is a signal advantage of taxes on articles of consumption that they contain in their own nature a security against excess. They prescribe their own limit, which cannot be exceeded without defeating the end proposed, that is, an extension of the revenue. When applied to this object, the saying is as just as it is witty, that "in political arithmetic, two and two do not always make four." If duties are too high, they lessen the consumption; the collection is eluded; and the product to the treasury is not so great as when they are confined within proper and moderate bounds. This forms a complete barrier against any material oppression of the citizens by taxes of this class, and is itself a natural limitation of the power of imposing them.[1]

See No. 35.

Impositions of this kind usually fall under the denomination of indirect taxes, and must for a long time constitute the chief part of the revenue raised in this country. Those of the direct kind, which principally relate to land and buildings, may admit of a rule of apportionment. Either the value of land or the number of the people may serve as a standard. The state of agriculture and the populousness of a country have been considered as nearly connected with each other. And, as a rule, for the purpose intended, numbers, in the view of simplicity and certainty, are entitled to a preference. In every country it is a herculean task to obtain a valuation of the land; in a country imperfectly settled and progressive in improvement, the difficulties are increased almost to impracticability. The expense of an accurate valuation is, in all situations, a formidable objection. In a branch of taxation where no limits to the discretion of the government are to be found in the nature of things, the establishment of a fixed rule, not incompatible with the end, may be attended with fewer inconveniences than to leave that discretion altogether at large.

PUBLIUS.

[1] Hamilton scarcely conceived the passage of a tariff bill framed purposely "for the reduction of revenue" by means of such excessive rates of duties as to reduce the importations to a minimum.—EDITOR.

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No. 22. (*New York Packet*, December 14, 1787.) Hamilton.

DEFECT OF THE ARTICLES OF CONFEDERATION AS TO COMMERCE, ARMY, STATE EQUALITY, JUDICIARY, AND CONGRESS.

Want of power to regulate commerce—Commercial treaties impossible—Separate prohibitions of certain states—Irritation between the states of the United States—Commerce of Germany—Quotas of soldiers—Competition and results in expense and bounties—Equal suffrage of the states a great evil—And contradicts a fundamental maxim of republican government—Minority government—Resulting evils in Congress—A check on good legislation as well as on bad—Result as to foreign nations—Republics subject to foreign corruption—One advantage of monarchy—Example of United Provinces—Crowning defect of the confederation a want of judiciary power—Necessity for a supreme tribune—Thirteen separate courts an impossibility—Evils of a single assembly or congress—The confederation ratified by the states, not by the people.

To the People of the State of New York:

In addition to the defects already enumerated in the existing federal system, there are others of not less importance, which concur in rendering it altogether unfit for the administration of the affairs of the Union.

The want of a power to regulate commerce is by all parties allowed to be of the number. The utility of such a power has been anticipated under the first head of our inquiries; and for this reason, as well as from the universal conviction entertained upon the subject, little need be added in this place. It is indeed evident on the most superficial view that there is no object, either as it respects the interests of trade or finance, that more strongly demands a federal superintendence. The want of it has already operated as a bar to the formation of beneficial treaties with foreign powers, and has given occasions of dissatisfaction between the States. No nation acquainted with the nature of our political association would be unwise enough to enter into stipulations with the United States, by which they conceded privileges

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of any importance to them, while they were apprised that the engagements on the part of the Union might at any moment be violated by its members, and while they found from experience that they might enjoy every advantage they desired in our markets, without granting us any return but such as their momentary convenience might suggest.[1] It is not, therefore, to be wondered at that Mr. Jenkinson, in ushering into the House of Commons a bill for regulating the temporary intercourse between the two countries, should preface its introduction by a declaration that similar provisions in former bills had been found to answer every purpose to the commerce of Great Britain, and that it would be prudent to persist in the plan until it should appear whether the American government was likely or not to acquire greater consistency.*

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*This, as nearly as I can recollect, was the sense of his speech on introducing the last bill.—PUBLIUS.

[1] In 1775 Parliament voted an entire cessation of trade with the revolted colonies, and these laws were in force when the treaty of peace was signed in 1783. In that year Pitt introduced a bill to "admit the Americans into the benefits of English commerce on terms of equality with the English subject." As the initial departure from the "mercantile system" of Great Britain, it encountered the most obstinate resistance, and produced from Lord Sheffield his able "Observations on the Commerce of the American States." This, together with the disunited action of the various states, proved to the British government that they could enjoy the commerce of the United States without making any concessions whatsoever, and for more than twelve years the trade was "provisionally" regulated by orders in council. In a report of a Committee of the Lords of the Privy Council on the Trade of Great Britain with the United States, 1791 (Washington, 1888), this very question of the practicality of prohibitions and restraints from the British standpoint was discussed, and decided against, as certain to result in a loss of trade to the restricting country equal to the injury done to the country discriminated against. In America after the organization of the national government, Hamilton supported an equally enlightened policy, but Jefferson, in his report on Commerce (1793), advocated a contrary system, which Madison attempted to carry out in Congress by his resolutions of January 3, 1794. From that day there has frequently existed a strongly anti-British party in Congress which has sought to force special privileges from our greatest customer by legislation unfriendly to her commerce and shipping. The most recent suggestions in this direction have been to lay, 1st, additional taxes on British goods, unless Great Britain adopts a bimetallic money, and 2d, special taxes on all goods not imported in American ships.—EDITOR.

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Several States have endeavored, by separate prohibitions, restrictions, and exclusions, to influence the conduct of that kingdom in this particular, but the want of concert, arising from the want of a general authority and from clashing and dissimilar views in the State, has hitherto frustrated every experiment of the kind, and will continue to do so as long as the same obstacles to a uniformity of measures continue to exist.

See No. 11.

The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy. "The commerce of the German empire * is in continual trammels from the multiplicity of the duties which the several princes and states exact upon the merchandises passing through their territories, by means of which the fine streams and navigable rivers with which Germany is so happily watered are rendered almost useless." Though the genius of the people of this country might never permit this description to be strictly applicable to us, yet we may reasonably expect, from the gradual conflicts of State regulations, that the citizens of each would at length come to be considered and treated by the others in no better light than that of foreigners and aliens.

See No. 7.

The power of raising armies, by the most obvious construction of the articles of the Confederation, is merely a power of making requisitions upon the States for quotas of men. This practice, in the course of the late war, was found replete with obstructions to a vigorous and to an economical system of defense. It gave birth to a competition between the States which created a kind of

* Encyclopedia, article "Empire."—PUBLIUS.

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auction for men. In order to furnish the quotas required of them, they outbid each other till bounties grew to an enormous and insupportable size.[1] The hope of a still further increase afforded an inducement to those who were disposed to serve to procrastinate their enlistment, and disinclined them from engaging for any considerable periods. Hence slow and scanty levies of men in the most critical emergencies of our affairs; short enlistments at an unparalleled expense; continual fluctuations in the troops, ruinous to their discipline and subjecting the public safety frequently to the perilous crisis of a disbanded army. Hence, also, those oppressive expedients for raising men which were upon several occasions practiced, and which nothing but the enthusiasm of liberty would have induced the people to endure.

This method of raising troops is not more unfriendly to economy and vigor than it is to an equal distribution of the burden. The States near the seat of war, influenced by motives of self-preservation, made efforts to furnish their quotas, which even exceeded their abilities; while those at a distance from danger were, for the most part, as remiss as the others were diligent in their exertions. The immediate pressure of this inequality was not in this case, as in that of the contributions of money, alleviated by the hope of a final liquidation. The States which did not pay their proportions of money might at least be charged with their deficiencies; but no account could be formed of the deficiencies in the supplies of men. We shall not, however, see much reason to regret the want of this hope, when we consider how little prospect there is that the most delinquent States will ever be able to make compensation for their pecuniary failures. The system of quotas and requisitions, whether it be applied to men or money, is, in every view, a system of imbecility in the Union, and of inequality and injustice among the members.

The right of equal suffrage among the States is another

[1] The same evil was manifested in the Civil War.—EDITOR.

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exceptionable part of the Confederation. Every idea of proportion and every rule of fair representation conspire to condemn a principle which gives to Rhode Island an equal weight in the scale of power with Massachusetts, or Connecticut, or New York; and to Delaware an equal voice in the national deliberations with Pennsylvania, or Virginia, or North Carolina. Its operation contradicts the fundamental maxim of republican government, which requires that the sense of the majority should prevail. Sophistry may reply that sovereigns are equal, and that a majority of the votes of the States will be a majority of confederated America. But this kind of logical legerdemain will never counteract the plain suggestions of justice and common-sense. It may happen that this majority of States is a small minority of the people of America;* and two-thirds of the people of America could not long be persuaded, upon the credit of artificial distinctions and syllogistic subtleties, to submit their interests to the management and disposal of one-third. The larger States would after a while revolt from the idea of receiving the law from the smaller. To acquiesce in such a privation of their due importance in the political scale would be not merely to be insensible to the love of power, but even to sacrifice the desire of equality. It is neither rational to expect the first, nor just to require the last. The smaller States, considering how peculiarly their safety and welfare depend on union, ought readily to renounce a pretension which, if not relinquished, would prove fatal to its duration.

See No. 62.

It may be objected to this, that not seven but nine States, or two-thirds of the whole number, must consent to the most important resolutions; and it may be thence inferred that nine States would always comprehend a majority of the Union. But this does not obviate the impropriety of an equal vote between States of the most

* New Hampshire, Rhode Island, New Jersey, Delaware, Georgia, South Carolina, and Maryland are a majority of the whole number of the States, but they do not contain one-third of the people.—PUBLIUS.

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unequal dimensions and populousness; nor is the inference accurate in point of fact; for we can enumerate nine States which contain less than a majority of the people;* and it is constitutionally possible that these nine may give the vote. Besides, there are matters of considerable moment determinable by a bare majority; and there are others, concerning which doubts have been entertained, which, if interpreted in favor of the sufficiency of a vote of seven States, would extend its operation to interests of the first magnitude. In addition to this, it is to be observed that there is a probability of an increase in the number of States, and no provision for a proportional augmentation of the ratio of votes.

But this is not all: what at first sight may seem a remedy is, in reality, a poison. To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision) is, in its tendency, to subject the sense of the greater number to that of the lesser. Congress, from the non-attendance of a few States, have been frequently in the situation of a Polish diet, where a single VOTE has been sufficient to put a stop to all their movements. A sixtieth part of the Union, which is about the proportion of Delaware and Rhode Island, has several times been able to oppose an entire bar to its operations. This is one of those refinements which, in practice, has an effect the reverse of what is expected from it in theory. The necessity of unanimity in public bodies, or of something approaching toward it, has been founded upon a supposition that it would contribute to security. But its real operation is to embarrass the administration, to destroy the energy of the government, and to substitute the pleasure, caprice, or artifices of an insignificant, turbulent, or corrupt junto, to the regular deliberations and decisions of a respectable majority. In those emergen-

* Add New York and Connecticut to the foregoing seven, and they will be less than a majority.—PUBLIUS.

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cies of a nation, in which the goodness or badness, the weakness or strength of its government, is of the greatest importance, there is commonly a necessity for action. The public business must, in some way or other, go forward. If a pertinacious minority can control the opinion of a majority, respecting the best mode of conducting it, the majority, in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will overrule that of the greater, and give a tone to the national proceedings. Hence tedious delays; continual negotiation and intrigue; contemptible compromises of the public good. And yet, in such a system, it is even happy when such compromises can take place; for upon some occasions things will not admit of accommodation; and then the measures of government must be injuriously suspended, or fatally defeated. It is often, by the impracticability of obtaining the concurrence of the necessary number of votes, kept in a state of inaction. Its situation must always savor of weakness, sometimes border upon anarchy.

It is not difficult to discover that a principle of this kind gives greater scope to foreign corruption, as well as to domestic faction, than that which permits the sense of the majority to decide; though the contrary of this has been presumed. The mistake has proceeded from not attending with due care to the mischiefs that may be occasioned by obstructing the progress of government at certain critical seasons. When the concurrence of a large number is required by the Constitution to the doing of any national act, we are apt to rest satisfied that all is safe, because nothing improper will be likely *to be done;* but we forget how much good may be prevented, and how much ill may be produced, by the power of hindering the doing what may be necessary, and of keeping affairs in the same unfavorable posture in which they may happen to stand at particular periods.

Suppose, for instance, we were engaged in a war, in conjunction with one foreign nation, against another. Sup-

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pose the necessity of our situation demanded peace, and the interest or ambition of our ally led him to seek the prosecution of the war, with views that might justify us in making separate terms. In such a state of things, this ally of ours would evidently find it much easier, by his bribes and intrigues, to tie up the hands of government from making peace, where two-thirds of all the votes were requisite to that object, than where a simple majority would suffice. In the first case, he would have to corrupt a smaller number; in the last, a greater number.[1] Upon the same principle, it would be much easier for a foreign power with which we were at war to perplex our councils and embarrass our exertions. And, in a commercial view, we may be subjected to similar inconveniences. A nation with which we might have a treaty of commerce could with much greater facility prevent our forming a connection with her competitor in trade, though such a connection should be ever so beneficial to ourselves.

See No. 59.

Evils of this description ought not to be regarded as imaginary. One of the weak sides of republics, among their numerous advantages, is that they afford too easy an inlet to foreign corruption. An hereditary monarch, though often disposed to sacrifice his subjects to his

[1] This dread of the influence of foreign governments was by no means unreasonable. During the Revolutionary War the French minister frequently interfered to influence Congressional action, and used secret service funds to corrupt both congressmen and the press, securing for his country, among other important advantages, an instruction to our peace envoys not to agree to a treaty with Great Britain which did not satisfy France, an instruction which fortunately was disregarded. In 1793, if the private dispatches of Genet are to be believed, Jefferson, in his enthusiasm for France, was supplying him with the most confidential secrets of the cabinet, and, a year later, the French minister wrote his government that Randolph, the Secretary of State, furnished him with "precious" information and virtually asked for money. During this period Great Britain, France, and Spain each had its particular writers and journals in this country, and the Spanish plottings in the West, the French minister's threat to appeal from the President to the people, and his interference in the Presidential election of 1797, and, somewhat later, the British intrigues in New England, all bear witness to how lightly national sentiment was held by a substantial part of the people. A foreign traveler of that time notes in this country that "there seemed to be many English, many French, but few Americans." After the end

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ambition, has so great a personal interest in the government and in the external glory of the nation, that it is not easy for a foreign power to give him an equivalent for what he would sacrifice by treachery to the state. The world has accordingly been witness to few examples of this species of royal prostitution, though there have been abundant specimens of every other kind.

In republics, persons elevated from the mass of the community by the suffrages of their fellow-citizens, to stations of great pre-eminence and power, may find compensations for betraying their trust, which, to any but minds animated and guided by superior virtue, may appear to exceed the proportion of interest they have in the common stock, and to overbalance the obligations of duty. Hence it is that history furnishes us with so many mortifying examples of the prevalency of foreign corruption in republican governments. How much this contributed to the ruin of the ancient commonwealths has been already delineated. It is well known that the deputies of the United Provinces have, in various instances, been purchased by the emissaries of the neighboring kingdoms. The Earl of Chesterfield (if my memory serves me right), in a letter to his court, intimates that his success in an important negotiation must depend on his obtaining a

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of the War of 1812, which marked the termination of our vital interest in European politics, the political questions became chiefly internal, and with them this introduction of foreign influence disappeared, very quickly followed by a reaction to the other extreme of intense dread of foreign influence. Traces of this, aimed only at particular nations, and due to temporary incidents, had already been shown by the enactment of the Alien law of 1798, and by an anti-alien clause of the amendments to the constitution proposed by the Hartford convention. But the great expression of it found vent in the "American" or, more commonly speaking, the "Know Nothing" party, which began about 1835, and with varying power manifested itself until the outbreak of the Civil War. A recurrence of this feeling expresses itself to-day in the A. P. A. It is to be noted, however, that these later movements served more or less as cloaks to the otherwise impossible scheme to introduce religious intolerance into American politics. The most recent introduction of the question of foreign influence was due to a very harmless private letter, written by the British minister in the campaign of 1888, which produced an outburst of indignation sufficient to induce the President, for partisan rather than diplomatic reasons, to request the recall of that minister.—EDITOR.

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major's commission for one of those deputies. And in Sweden the parties were alternately bought by France and England in so barefaced and notorious a manner that it excited universal disgust in the nation, and was a principal cause that the most limited monarch in Europe, in a single day, without tumult, violence, or opposition, became one of the most absolute and uncontrolled.

A circumstance which crowns the defects of the Confederation remains yet to be mentioned—the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one SUPREME TRIBUNAL. And this tribunal ought to be instituted under the same authority which forms the treaties themselves. These ingredients are both indispensable. If there is in each State a court of final jurisdiction, there may be as many different final determinations on the same point as there are courts. There are endless diversities in the opinions of men. We often see not only different courts, but the judges of the same court differing from each other. To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice.

See No. 78.

This is the more necessary where the frame of the government is so compounded that the laws of the whole are in danger of being contravened by the laws of the parts. In this case, if the particular tribunals are invested with a right of ultimate jurisdiction, besides the contradictions to be expected from difference of opinion, there will be much to fear from the bias of local views

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and prejudices, and from the interference of local regulations. As often as such an interference was to happen, there would be reason to apprehend that the provisions of the particular laws might be preferred to those of the general laws; for nothing is more natural to men in office than to look with peculiar deference toward that authority to which they owe their official existence. The treaties of the United States, under the present Constitution, are liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of those legislatures.[1] The faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed. Is it possible that foreign nations can either respect or confide in such a government? Is it possible that the people of America will longer consent to trust their honor, their happiness, their safety, on so precarious a foundation?

In this review of the Confederation, I have confined myself to the exhibition of its most material defects; passing over those imperfections in its details by which even a great part of the power intended to be conferred upon it has been in a great measure rendered abortive. It must be by this time evident to all men of reflection who can divest themselves of the prepossessions of preconceived opinions, that it is a system so radically vicious and unsound as to admit not of amendment but by an entire change in its leading features and characters.

The organization of Congress is itself utterly improper for the exercise of those powers which are necessary to be deposited in the Union. A single assembly may be a proper receptacle of those slender, or rather, fettered authorities, which have been heretofore delegated to the federal head; but it would be inconsistent with all the

[1] On the subject of infractions of the British Treaty of 1783 by the various States, see Hammond's and Jefferson's correspondence ("American State Papers, Foreign Relations," i. 193).—EDITOR.

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principles of good government to intrust it with those additional powers which, even the moderate and more rational adversaries of the proposed Constitution admit, ought to reside in the United States.[1] If that plan should not be adopted, and if the necessity of the Union should be able to withstand the ambitious aims of those men who may indulge magnificent schemes of personal aggrandizement from its dissolution, the probability would be that we should run into the project of conferring supplementary powers upon Congress, as they are now constituted; and either the machine, from the intrinsic feebleness of its structure, will molder into pieces, in spite of our ill-judged efforts to prop it; or, by successive augmentations of its force and energy, as necessity might prompt, we shall finally accumulate, in a

[1] The Continental Congress had illustrated the evils of a single legislative body. Frequently it had adopted resolutions only to repeal them the next day, and in several cases had rejected, reconsidered, and adopted, and again rejected in the course of a week, the same motion; the change being due to the arrival or departure of members, and to the lack of any check. A want of stability had likewise been shown in the single assembly body of Pennsylvania, the history of which had been marked by extremely impulsive and variable legislation. The value of a dual-bodied legislative power seems not merely to consist in the additional check on hasty legislation which the delay of separate consideration necessarily involves, but in a still greater degree, in the inevitable competition in which they become involved. Both seek public favor, and they therefore become rivals. Necessarily a measure originated by one encounters in the other a stern criticism, and this is so keen that frequently each house prepares its own bill, and having done so, adheres to it with a positiveness that has compelled the introduction of a new legislative element in the shape of a third or union chamber, usually termed a conference committee, made up of an equal number of members from the two bodies, whose joint action in practice has become almost dictatorial. The tendency the world over (in spite of Congressional adoption of the "previous question" and the parliamentary introduction of "closure," to say nothing of a steadily increasing power over legislative action granted to presiding officers) is to make legislation slower and otherwise more difficult. While this may have its apparent disadvantages it is probable that the public gain far more than they lose, for it is certain that, in sharply critical moments, Congress can still act with the greatest celerity (notably in their vote of the funds entailed by the Venezuelan message), and the ordinary delay not merely gives more time for consideration, but even prevents much legislation. The dissolution of each Congress is a grave to many thousand bills, which would have been passed had they but been reached in the session; their uselessness is well proven by subsequent events.—EDITOR.

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single body, all the most important prerogatives of sovereignty, and thus entail upon our posterity one of the most execrable forms of government that human infatuation ever contrived. Thus we should create in reality that very tyranny which the adversaries of the new Constitution either are, or affect to be, solicitous to avert.

It has not a little contributed to the infirmities of the existing federal system that it never had a ratification by the PEOPLE. Resting on no better foundation than the consent of the several legislatures, it has been exposed to frequent and intricate questions concerning the validity of its powers, and has, in some instances, given birth to the enormous doctrine of a right of legislative repeal. Owing its ratification to the law of a State, it has been contended that the same authority might repeal the law by which it was ratified. However gross a heresy it may be to maintain that a *party* to a *compact* has a right to revoke that *compact*, the doctrine itself has had respectable advocates. The possibility of a question of this nature proves the necessity of laying the foundations of our national government deeper than in the mere sanction of delegated authority. The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority. PUBLIUS.

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No. (*New York Journal*, December 18, 1787.*) Hamilton.

NECESSITY OF A GOVERNMENT AT LEAST EQUALLY ENERGETIC WITH THE ONE PROPOSED.

Objects to be provided for by national government—Armies and fleets—Condition under present confederation—Vain project of legislating upon the States—Laws must be extended to individual citizens—The essential point in a compound government a discrimination of power—Fleets and armies from this point of view.

To the People of the State of New York:

The necessity of a Constitution, at least equally energetic with the one proposed to the preservation of the Union, is the point at the examination of which we are now arrived.

This inquiry will naturally divide itself into three branches: the objects to be provided for by the federal government, the quantity of power necessary to the accomplishment of those objects, the persons upon whom that power ought to operate. Its distribution and organization will more properly claim our attention under the succeeding head.

The principal purposes to be answered by union are these: the common defense of the members; the preservation of the public peace, as well against internal convulsions as external attacks; the regulation of commerce with other nations and between the States; the superintendence of our intercourse, political and commercial, with foreign countries.

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* "Yesterday the manuscript copy of the subsequent was communicated to the editor, with an assurance that his press should be preferred, in future, for the first ushering into public view the succeeding numbers. If the public are pleased to stigmatize the editor as a partial printer, in the face of his reiterated assertions of 'being influenced by none,' what more can be said! This stigma he prefers to that of a slavish copyist; consequently, unless manuscripts are communicated, he will be constrained (however injudicious) still to crouch under the weighty charge of partiality."—*New York Journal*, *December* 18, 1787.

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The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, *because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense.

This is one of those truths which, to a correct and unprejudiced mind, carries its own evidence along with it; and may be obscured but cannot be made plainer by argument or reasoning. It rests upon axioms as simple as they are universal; the *means* ought to be proportioned to the *end;* the persons from whose agency the attainment of any *end* is expected ought to possess the *means* by which it is to be attained.

Whether there ought to be a federal government intrusted with the care of the common defense is a question, in the first instance, open for discussion; but the moment it is decided in the affirmative, it will follow that that government ought to be clothed with all the powers requisite to complete execution of its trust. And unless it can be shown that the circumstances which may affect the public safety are reducible within certain determinate limits; unless the contrary of this position can be fairly and rationally disputed, it must be admitted, as a necessary consequence, that there can be no limitation of that authority which is to provide for the defense and protection of the community, in any matter essential to its efficacy—that is, in any matter essential to the *formation, direction,* or *support* of the NATIONAL FORCES.

Defective as the present Confederation has been proved

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to be, this principle appears to have been fully recognized by the framers of it; though they have not made proper or adequate provision for its exercise. Congress have an unlimited discretion to make requisitions of men and money; to govern the army and navy; to direct their operations. As their requisitions are made constitutionally binding upon the States, who are in fact under the most solemn obligations to furnish the supplies required of them, the intention evidently was that the United States should command whatever resources were by them judged requisite to the "common defense and general welfare." It was presumed that a sense of their true interests, and a regard to the dictates of good faith, would be found sufficient pledges for the punctual performance of the duty of the members to the federal head.

The experiment has, however, demonstrated that this expectation was ill-founded and illusory; and the observations made under the last head will, I imagine, have sufficed to convince the impartial and discerning that there is an absolute necessity for an entire change in the first principles of the system; that if we are in earnest about giving the Union energy and duration, we must abandon the vain project of legislating upon the States in their collective capacities; we must extend the laws of the federal government to the individual citizens of America; we must discard the fallacious scheme of quotas and requisitions, as equally impracticable and unjust. The result from all this is that the Union ought to be invested with full power to levy troops; to build and equip fleets; and to raise the revenues which will be required for the formation and support of an army and navy, in the customary and ordinary modes practiced in other governments.

If the circumstances of our country are such as to demand a compound instead of a simple, a confederate instead of a sole, government, the essential point which will remain to be adjusted will be to discriminate the OBJECTS, as far as it can be done, which shall appertain to the different provinces or departments of power;

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allowing to each the most ample authority for fulfilling the objects committed to its charge. Shall the Union be constituted the guardian of the common safety? Are fleets and armies and revenues necessary to this purpose? The government of the Union must be empowered to pass all laws and to make all regulations which have relation to them. The same must be the case in respect to commerce and to every other matter to which its jurisdiction is permitted to extend. Is the administration of justice between the citizens of the same State the proper department of the local governments? These must possess all the authorities which are connected with this object and with every other that may be allotted to their particular cognizance and direction. Not to confer in each case a degree of power commensurate to the end would be to violate the most obvious rules of prudence and propriety, and improvidently to trust the great interests of the nation to hands which are disabled from managing them with vigor and success.

Who so likely to make suitable provisions for the public defense as that body to which the guardianship of the public safety is confided; which, as the center of information, will best understand the extent and urgency of the dangers that threaten; as the representative of the WHOLE, will feel itself most deeply interested in the preservation of every part; which, from the responsibility implied in the duty assigned to it, will be most sensibly impressed with the necessity of proper exertions; and which, by the extension of its authority throughout the States, can alone establish uniformity and concert in the plans and measures by which the common safety is to be secured? Is there not a manifest inconsistency in devolving upon the federal government the care of the general defense, and leaving in the State governments the *effective* powers by which it is to be provided for? Is not a want of co-operation the infallible consequence of such a system? And will not weakness, disorder, an undue distribution of the burdens and calamities of war, an unnecessary and intolerable increase of expense, be its

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natural and inevitable concomitants? Have we not had unequivocal experience of its effects in the course of the revolution which we have just accomplished?

Every view we may take of the subject, as candid inquirers after truth, will serve to convince us that it is both unwise and dangerous to deny the federal government an unconfined authority, as to all those objects which are intrusted to its management. It will indeed deserve the most vigilant and careful attention of the people, to see that it be modeled in such a manner as to admit of its being safely vested with the requisite powers. If any plan which has been or may be offered to our consideration, should not, upon a dispassionate inspection, be found to answer this description, it ought to be rejected. A government, the constitution of which renders it unfit to be trusted with all the powers which a free people *ought to delegate to any government*, would be an unsafe and improper depositary of the NATIONAL INTERESTS. Wherever THESE can with propriety be confided, the coincident powers may safely accompany them. This is the true result of all just reasoning upon the subject. And the adversaries of the plan promulgated by the convention ought to have confined themselves to showing that the internal structure of the proposed government was such as to render it unworthy of the confidence of the people. They ought not to have wandered into inflammatory declamations and unmeaning cavils about the extent of the powers. The POWERS are not too extensive for the OBJECTS of federal administration, or, in other words, for the management of our NATIONAL INTERESTS; nor can any satisfactory argument be framed to show that they are chargeable with such an excess. If it be true, as has been insinuated by some of the writers on the other side, that the difficulty arises from the nature of the thing, and that the extent of the country will not permit us to form a government in which such ample powers can safely be reposed, it would prove that we ought to contract our views and resort to the expedient of separate

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confederacies, which will move within more practicable spheres. For the absurdity must continually stare us in the face of confiding to a government the direction of the most essential national interests, without daring to trust it to the authorities which are indispensable to their proper and efficient management. Let us not attempt to reconcile contradictions, but firmly embrace a rational alternative.

I trust, however, that the impracticability of one general system cannot be shown. I am greatly mistaken if anything of weight has yet been advanced of this tendency; and I flatter myself that the observations which have been made in the course of these papers have served to place the reverse of that position in as clear a light as any matter still in the womb of time and experience can be susceptible of. This, at all events, must be evident, that the very difficulty itself, drawn from the extent of the country, is the strongest argument in favor of an energetic government; for any other can certainly never preserve the union of so large an empire. If we embrace the tenets of those who oppose the adoption of the proposed Constitution, as the standard of our political creed, we cannot fail to verify the gloomy doctrines which predict the impracticability of a national system pervading entire limits of the present Confederacy.

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No. 24. (*New York Journal*, December 19, 1787.) **Hamilton.**

POWERS CONFERRED BY NEW CONSTITUTION IN REGARD TO NATIONAL FORCES.

Alleged want of proper provision against the existence of standing armies in time of peace—Restriction of the legislative authority as regards military establishments an unheard-of principle—Where the constitution vests control—Clauses in the state constitutions in regard to standing army—The same clause in the articles of confederation—Dangers threatening America—Necessity for western garrisons—British and Spanish colonies—Protection of navy yards and arsenals.

To the People of the State of New York:

To the powers proposed to be conferred upon the federal government, in respect to the creation and direction of the national forces, I have met with but one specific objection, which, if I understand it right, is this —that proper provision has not been made against the existence of standing armies in time of peace; an objection which I shall now endeavor to show rests on weak and unsubstantial foundations.

See No. 8.

It has indeed been brought forward in the most vague and general form, supported only by bold assertions, without the appearance of argument; without even the sanction of theoretical opinions; in contradiction to the practice of other free nations and to the general sense of America as expressed in most of the existing constitutions. The propriety of this remark will appear the moment it is recollected that the objection under consideration turns upon a supposed necessity of restraining the LEGISLATIVE authority of the nation, in the article of military establishments; a principle unheard of, except in one or two of our State constitutions, and rejected in all the rest.

A stranger to our politics who was to read our newspapers at the present juncture, without having previously inspected the plan reported by the convention, would be naturally led to one of two conclusions: either

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that it contained a positive injunction that standing armies should be kept up in time of peace; or that it vested in the EXECUTIVE the whole power of levying troops without subjecting his discretion, in any shape, to the control of the legislature.

If he came afterward to peruse the plan itself, he would be surprised to discover that neither the one nor the other was the case; that the whole power of raising armies was lodged in the *Legislature*, not in the *Executive;* that this legislature was to be a popular body, consisting of the representatives of the people, periodically elected; and that instead of the provision he had supposed in favor of standing armies, there was to be found, in respect to this object, an important qualification even of the legislative discretion, in that clause which forbids the appropriation of money for the support of an army for any longer period than two years—a precaution which, upon a nearer view of it, will appear to be a great and real security against the keeping up of troops without evident necessity.

Disappointed in his first surmise, the person I have supposed would be apt to pursue his conjectures a little further. He would naturally say to himself, it is impossible that all this vehement and pathetic declamation can be without some colorable pretext. It must needs be that this people, so jealous of their liberties, have, in all the preceding models of the constitutions which they have established, inserted the most precise and rigid precautions on this point, the omission of which, in the new plan, has given birth to all this apprehension and clamor.

If, under this impression, he proceeded to pass in review the several State constitutions, how great would be his disappointment to find that *two only* of them* contained an interdiction of standing armies in

* This statement of the matter is taken from the printed collection of State constitutions. Pennsylvania and North Carolina are the two which contain the interdiction in these words: "As standing armies in time of peace are dangerous to liberty, THEY OUGHT NOT to be kept

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time of peace; that the other eleven had either observed a profound silence on the subject, or had in express terms admitted the right of the Legislature to authorize their existence.

Still, however, he would be persuaded that there must be some plausible foundation for the cry raised on this head. He would never be able to imagine, while any source of information remained unexplored, that it was nothing more than an experiment upon the public credulity, dictated either by a deliberate intention to deceive or by the overflowings of a zeal too intemperate to be ingenuous. It would probably occur to him that he would be likely to find the precautions he was in search of in the primitive compact between the States. Here at length he would expect to meet with a solution of the enigma. No doubt, he would observe to himself, the existing Confederation must contain the most explicit provisions against military establishments in time of peace; and a departure from this model, in a favorite point, has occasioned the discontent which appears to influence these political champions.

If he should now apply himself to a careful and critical survey of the articles of Confederation, his astonishment would not only be increased, but would acquire a mixture of indignation at the unexpected discovery that these articles, instead of containing the prohibition he looked for, and though they had, with jealous circumspection, restricted the authority of the State legislatures in this particular, had not imposed a single restraint on that of

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up." This is, in truth, rather a CAUTION than a PROHIBITION. New Hampshire, Massachusetts, Delaware, and Maryland have, in each of their bills of rights, a clause to this effect: "Standing armies are dangerous to liberty, and ought not to be raised or kept up WITHOUT THE CONSENT OF THE LEGISLATURE"; which is a formal admission of the authority of the Legislature. New York has no bills of rights, and her constitution says not a word about the matter. No bills of rights appear annexed to the constitutions of the other States, except the foregoing, and their constitutions are equally silent. I am told, however, that one or two States have bills of rights which do not appear in this collection; but that those also recognize the right of the legislative authority in this respect.—PUBLIUS.

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the United States. If he happened to be a man of quick sensibility or ardent temper, he could now no longer refrain from regarding these clamors as the dishonest artifices of a sinister and unprincipled opposition to a plan which ought at least to receive a fair and candid examination from all sincere lovers of their country! How else, he would say, could the authors of them have been tempted to vent such loud censures upon that plan, about a point in which it seems to have conformed itself to the general sense of America as declared in its different forms of government, and in which it has even superadded a new and powerful guard unknown to any of them? If, on the contrary, he happened to be a man of calm and dispassionate feelings, he would indulge a sigh for the frailty of human nature, and would lament that, in a matter so interesting to the happiness of millions, the true merits of the question should be perplexed and entangled by expedients so unfriendly to an impartial and right determination. Even such a man could hardly forbear remarking that a conduct of this kind has too much the appearance of an intention to mislead the people by alarming their passions, rather than to convince them by arguments addressed to their understandings.

But however little this objection may be countenanced, even by precedents among ourselves, it may be satisfactory to take a nearer view of its intrinsic merits. From a close examination it will appear that restraints upon the discretion of the legislature in respect to military establishments in time of peace would be improper to be imposed, and if imposed, from the necessities of society, would be unlikely to be observed.

Though a wide ocean separates the United States from Europe, yet there are various considerations that warn us against an excess of confidence or security. On one side of us, and stretching far into our rear, are growing settlements subject to the dominion of Britain. On the other side, and extending to meet the British settlements, are colonies and establishments subject to the dominion of Spain. This situation and the vicinity of the West India Islands, belonging to these two powers, create between

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them, in respect to their American possessions and in relation to us, a common interest. The savage tribes on our Western frontier ought to be regarded as our natural enemies, their natural allies, because they have most to fear from us, and most to hope from them. The improvements in the art of navigation have, as to the facility of communication, rendered distant nations, in a great measure, neighbors. Britain and Spain are among the principal maritime powers of Europe. A future concert of views between these nations ought not to be regarded as improbable. The increasing remoteness of consanguinity is every day diminishing the force of the family compact between France and Spain. And politicians have ever, with great reason, considered the ties of blood as feeble and precarious links of political connection. These circumstances, combined, admonish us not to be too sanguine in considering ourselves as entirely out of the reach of danger.

Previous to the Revolution, and ever since the peace, there has been a constant necessity for keeping small garrisons on our Western frontier. No person can doubt that these will continue to be indispensable, if it should only be against the ravages and depredations of the Indians. These garrisons must either be furnished by occasional detachments from the militia or by permanent corps in the pay of the government. The first is impracticable; and, if practicable, would be pernicious. The militia would not long, if at all, submit to be dragged from their occupations and families to perform that most disagreeable duty in times of profound peace. And if they could be prevailed upon or compelled to do it, the increased expense of a frequent rotation of service, and the loss of labor and disconcertion of the industrious pursuits of individuals, would form conclusive objections to the scheme. It would be as burdensome and injurious to the public as ruinous to private citizens. The latter resource of permanent corps in the pay of the government amounts to a standing army in time of peace; a small one, indeed, but not the less real for being small. Here is a simple view of the subject, that shows us at once the impropriety of a constitutional interdiction of such establishments and the necessity of leaving the matter to the discretion and prudence of the legislature.

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In proportion to our increase in strength, it is probable, nay, it may be said certain, that Britain and Spain would augment their military establishments in our neighborhood. If we should not be willing to be exposed, in a naked and defenseless condition, to their insults and encroachments, we should find it expedient to increase our frontier garrisons in some ratio to the force by which our Western settlements might be annoyed. There are, and will be, particular posts, the possession of which will include the command of large districts of territory, and facilitate future invasions of the remainder. It may be added that some of those posts will be keys to the trade with the Indian nations. Can any man think it would be wise to leave such posts in a situation to be at any instant seized by one or the other of two neighboring and formidable powers? To act this part would be to desert all the usual maxims of prudence and policy.

If we mean to be a commercial people, or even to be secure on our Atlantic side, we must endeavor, as soon as possible, to have a navy. To this purpose there must be dockyards and arsenals; and for the defense of these, fortifications and probably garrisons. When a nation has become so powerful by sea that it can protect its dockyards by its fleets, this supersedes the necessity of garrisons for that purpose; but where naval establishments are in their infancy, moderate garrisons will, in all likelihood, be found an indispensable security against descents for the destruction of the arsenals and dockyards, and sometimes of the fleet itself. PUBLIUS.

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No. 25. (*New York Journal*, December 21, 1787.) Hamilton.

NATIONAL FORCES COMPARED WITH STATE FORCES.

Necessity of national control of army and navy—Situation of states as regards foreign enemies—Critical position of New York—State governments natural rivals of the national—Likelihood that the people will support their local government—The states restrained from standing forces—Want of definition in proposed negative on standing armies—Impossibility of a conspiracy between the executive and the legislative departments—Actual effect of a prohibition on standing armies—Inadequacy of the militia—Recent experience of Pennsylvania and Massachusetts—Experience of the Lacedæmonians.

To the People of the State of New York:

It may perhaps be urged that the objects enumerated in the preceding number ought to be provided for by the State governments, under the direction of the Union. But this would be in reality an inversion of the primary principle of our political association, as it would in practice transfer the care of the common defense from the federal head to the individual members: a project oppressive to some States, dangerous to all, and baneful to the Confederacy.

The territories of Britain, Spain, and of the Indian nations in our neighborhood do not border on particular States, but encircle the Union from Maine to Georgia. The danger, though in different degrees, is therefore common, and the means of guarding against it ought, in like manner, to be the objects of common councils and of a common treasury. It happens that some States, from local situation, are more directly exposed. New York is of this class. Upon the plan of separate provisions, New York would have to sustain the whole weight of the establishments requisite to her immediate safety, and to the mediate or ultimate protection of her neighbors. This would neither be equitable as it respected New York, nor safe as it respected the other States. Various inconveniences would attend such a system. The States to whose lot it might fall to support the necessary establishments would be as little able as willing, for a considerable time to come, to bear the burden of competent provisions. The security of all

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would thus be subjected to the parsimony, improvidence, or inability, of a part. If the resources of such part becoming more abundant and extensive, its provisions should be proportionably enlarged, the other States would quickly take the alarm at seeing the whole military force of the Union in the hands of two or three of its members, and those probably amongst the most powerful. They would each choose to have some counterpoise, and pretenses could easily be contrived. In this situation, military establishments, nourished by mutual jealousy, would be apt to swell beyond their natural or proper size; and being at the separate disposal of the members, they would be engines for the abridgment or demolition of the national authority.

Reasons have been already given to induce a supposition that the State governments will too naturally be prone to a rivalship with that of the Union, the foundation of which will be the love of power; and that in any contest between the federal head and one of its members the people will be most apt to unite with their local government.[1] If, in addition to this immense advantage, the ambition of the members should be stimulated by the separate and independent possession of military forces, it would afford too strong a temptation and too great a facility to them to make enterprises upon, and finally to subvert, the constitutional authority of the Union. On the other hand, the liberty of the people would be less safe in this state of things than in that which left the national forces in the hands of the national government. As far as an army may be considered as a dangerous weapon of power, it had better be in those hands of which the people are most likely to be jealous than in those of which they are least likely to be jealous. For it is a truth which the experience of ages has attested, that the people are always most in danger when the means of injuring their rights are in the possession of those of whom they entertain the least suspicion.

[1] This was proved to an extraordinary degree at the outbreak of the Civil War. With what was practical unity, the people of each state adhered to their section, and even national office-holders and the army and navy officers of the South rarely failed, though they sometimes hesitated, to violate their previously taken oaths of allegiance to the United States.—EDITOR.

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The framers of the existing Confederation, fully aware of the danger to the Union from the separate possession of military forces by the States, have, in express terms, prohibited them from having either ships or troops, unless with the consent of Congress.[1] The truth is that the existence of a federal government and military establishments under State authority are not less at variance with each other than a due supply of the federal treasury and the system of quotas and requisitions.

There are other lights, besides those already taken notice of, in which the impropriety of restraints on the discretion of the national legislature will be equally manifest. The design of the objection which has been mentioned is to preclude standing armies in time of peace, though we have never been informed how far it is designed the prohibition should extend: whether to raising armies as well as to *keeping them up* in a season of tranquillity or not. If it be confined to the latter, it will have no precise signification and it will be ineffectual for the purpose intended. When armies are once raised, what shall be denominated "keeping them up," contrary to the sense of the Constitution? What time shall be requisite to ascertain the violation? Shall it be a week, a month, a year? Or shall we say they may be continued as long as the danger which occasioned their being raised, continues? This would be to admit that they might be kept up in *time of peace*, against threatening or impending danger, which would be at once to deviate from the literal meaning of the prohibition, and to introduce an extensive latitude of construction. Who shall judge of the continuance of the danger? This must undoubtedly be submitted to the national government, and the matter would then be brought to this issue, that the national government, to provide against apprehended danger, might in the first instance raise troops, and might afterward keep them on foot as long as they supposed the peace or safety of the community was in any degree of

[1] None the less, South Carolina in 1832 raised twelve thousand "volunteers" in her preparations to resist the general government.—EDITOR.

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jeopardy. It is easy to perceive that a discretion so latitudinary as this would afford ample room for eluding the force of the provision.

The supposed utility of a provision of this kind can only be founded on the supposed probability, or at least possibility, of a combination between the executive and the legislative, in some scheme of usurpation. Should this at any time happen, how easy would it be to fabricate pretenses of approaching danger! Indian hostilities, instigated by Spain or Britain, would always be at hand. Provocations to produce the desired appearances might even be given to some foreign power, and appeased again by timely concessions. If we can reasonably presume such a combination to have been formed, and that the enterprise is warranted by a sufficient prospect of success, the army, when once raised, from whatever cause, or on whatever pretext, may be applied to the execution of the project.

If, to obviate this consequence, it should be resolved to extend the prohibition to the *raising* of armies in time of peace, the United States would then exhibit the most extraordinary spectacle which the world has yet seen—that of a nation incapacitated by its Constitution to prepare for defense before it was actually invaded. As the ceremony of a formal denunciation of war has of late fallen into disuse, the presence of an enemy within our territories must be waited for, as the legal warrant to the government to begin its levies of men for the protection of the State. We must receive the blow before we could even prepare to return it. All that kind of policy by which nations anticipate distant danger and meet the gathering storm must be abstained from as contrary to the genuine maxims of a free government. We must expose our property and liberty to the mercy of foreign invaders and invite them by our weakness to seize the naked and defenseless prey, because we are afraid that rulers, created by our choice, dependent on our will, might endanger that liberty by an abuse of the means necessary to its preservation.

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Here I expect we shall be told that the militia of the country is its natural bulwark, and would be at all times equal to the national defense. This doctrine, in substance, had like to have lost us our independence. It cost millions to the United States that might have been saved. The facts which, from our own experience, forbid a reliance of this kind are too recent to permit us to be the dupes of such a suggestion. The steady operations of war against a regular and disciplined army can only be successfully conducted by a force of the same kind. Considerations of economy, not less than of stability and vigor, confirm this position. The American militia, in the course of the late war, have, by their valor on numerous occasions, erected eternal monuments to their fame; but the bravest of them feel and know that the liberty of their country could not have been established by their efforts alone, however great and valuable they were. War, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice.

All violent policy, as it is contrary to the natural and experienced course of human affairs, defeats itself. Pennsylvania, at this instant, affords an example of the truth of this remark. The Bill of Rights of that State declares that standing armies are dangerous to liberty and ought not to be kept up in time of peace. Pennsylvania, nevertheless, in a time of profound peace, from the existence of partial disorders in one or two of her counties, has resolved to raise a body of troops; and in all probability will keep them up as long as there is any appearance of danger to the public peace.[1] The conduct of Massachusetts affords a lesson on the same subject, though on different ground. That State (without waiting for the sanction of Congress, as the articles of the Confederation require) was compelled to raise troops to quell a domestic insurrection, and still keeps a corps in pay to prevent a revival of the spirit of revolt.[2] The particular constitution of Massachusetts opposed no obstacle to the measure; but the instance is still of use to instruct us that cases are likely to occur under our government, as well as under those of other nations, which will some-

[1] The Wyoming controversy.—EDITOR.
[2] To suppress Shays's rebellion.—EDITOR.

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times render a military force in time of peace essential to the security of the society, and that it is therefore improper in this respect to control the legislative discretion. It also teaches us, in its application to the United States, how little the rights of a feeble government are likely to be respected, even by its own constituents. And it teaches us, in addition to the rest, how unequal parchment provisions are to a struggle with public necessity.

It was a fundamental maxim of the Lacedæmonian commonwealth that the post of admiral should not be conferred twice on the same person. The Peloponnesian confederates, having suffered a severe defeat at sea from the Athenians, demanded Lysander, who had before served with success in that capacity, to command the combined fleets. The Lacedæmonians, to gratify their allies, and yet preserve the semblance of an adherence to their ancient institutions, had recourse to the flimsy subterfuge of investing Lysander with the real power of admiral, under the nominal title of vice admiral. This instance is selected from among a multitude that might be cited to confirm the truth already advanced and illustrated by domestic examples; which is, that nations pay little regard to rules and maxims calculated in their very nature to run counter to the necessities of society. Wise politicians will be cautious about fettering the government with restrictions that cannot be observed, because they know that every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers toward the constitution of a country, and forms a precedent for other breaches where the same plea of necessity does not exist at all, or is less urgent and palpable.

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No. 26. (*Independent Journal*, December 22, 1787.) Hamilton.

ABSURDITY OF RESTRAINING THE LEGISLATIVE AUTHORITY AS TO NATIONAL DEFENSE.

Popular revolutions not able to apportion power and privilege—The restraint on legislatures as to defense in the state constitutions—General decision of America opposed to such restraint—History of the restriction on standing army in Great Britain—Present condition in that country—An hereditary prejudice to standing armies in America—The state constitutions—Clause in constitutions of Pennsylania and North Carolina—Biennial appropriations under the new constitution for army—Absurdity of the predictions of the subversion of American liberty—Impossibility of greatly augmenting the army—Danger from the executive—Danger all the greater in a disunited state.

To the People of the State of New York:

It was a thing hardly to be expected that in a popular revolution the minds of men should stop at that happy mean which marks the salutary boundary between POWER and PRIVILEGE, and combines the energy of government with the security of private rights. A failure in this delicate and important point is the great source of the inconveniences we experience, and if we are not cautious to avoid a repetition of the error in our future attempts to rectify and ameliorate our system, we may travel from one chimerical project to another; we may try change after change; but we shall never be likely to make any material change for the better.

The idea of restraining the legislative authority in the means of providing for the national defense is one of those refinements which owe their origin to a zeal for liberty more ardent than enlightened. We have seen, however, that it has not had thus far an extensive prevalency; that even in this country, where it made its first appearance, Pennsylvania and North Carolina are the only two States by which it has been in any degree patronized; and that all the others have refused to give

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it the least countenance; wisely judging that confidence must be placed somewhere; that the necessity of doing it is implied in the very act of delegating power; and that it is better to hazard the abuse of that confidence than to embarrass the government and endanger the public safety by impolitic restrictions on the legislative authority. The opponents of the proposed Constitution combat, in this respect, the general decision of America; and, instead of being taught by experience the propriety of correcting any extremes into which we may have heretofore run, they appear disposed to conduct us into others still more dangerous and more extravagant. As if the tone of government had been found too high or too rigid, the doctrines they teach are calculated to induce us to depress or to relax it, by expedients which, upon other occasions, have been condemned or forborne. It may be affirmed, without the imputation of invective, that if the principles they inculcate on various points could so far obtain as to become the popular creed, they would utterly unfit the people of this country for any species of government whatever. But a danger of this kind is not to be apprehended. The citizens of America have too much discernment to be argued into anarchy. And I am much mistaken, if experience has not wrought a deep and solemn conviction in the public mind that greater energy of government is essential to the welfare and prosperity of the community.

It may not be amiss in this place concisely to remark the origin and progress of the idea which aims at the exclusion of military establishments in time of peace. Though in speculative minds it may arise from a contemplation of the nature and tendency of such institutions, fortified by the events that have happened in other ages and countries, yet as a national sentiment it must be traced to those habits of thinking which we derive from the nation from whom the inhabitants of these States have in general sprung.

In England, for a long time after the Norman Conquest, the authority of the monarch was almost unlimited. Inroads were

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gradually made upon the prerogative, in favor of liberty, first by the barons, and afterwards by the people, till the greatest part of its most formidable pretensions became extinct. But it was not till the revolution in 1688, which elevated the Prince of Orange to the throne of Great Britain, that English liberty was completely triumphant. As incident to the undefined power of making war, an acknowledged prerogative of the crown, Charles II. had by his own authority kept on foot in time of peace a body of five thousand regular troops. And this number James II. increased to thirty thousand, who were paid out of his civil list. At the revolution, to abolish the exercise of so dangerous an authority, it became an article of the Bill of Rights then framed, that "the raising or keeping a standing army within the kingdom in time of peace, *unless with the consent of Parliament*, was against law."

In that kingdom, when the pulse of liberty was at its highest pitch, no security against the danger of standing armies was thought requisite, beyond a prohibition of their being raised or kept up by the mere authority of the executive magistrate. The patriots who effected that memorable revolution were too temperate, too well informed, to think of any restraint on the legislative discretion. They were aware that a certain number of troops for guards and garrisons were indispensable; that no precise bounds could be set to the national exigencies; that a power equal to every possible contingency must exist somewhere in the government; and that when they referred the exercise of that power to the judgment of the legislature, they had arrived at the ultimate point of precaution which was reconcilable with the safety of the community.

From the same source, the people of America may be said to have derived an hereditary impression of danger to liberty from standing armies in time of peace. The circumstances of a revolution quickened the public sensibility on every point connected with the security of popular rights, and in some instances raised the warmth of our zeal beyond the degree which consisted with the due temperature of the body politic. The attempts of two of the States to restrict the authority of the legislature, in the article of military establishments, are of the number of these instances. The principles which had taught us to be jealous of the power of an hereditary monarch were, by an injudicious excess, extended to the representatives of the people in their popular assemblies.

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Even in some of the States where this error was not adopted we find unnecessary declarations that standing armies ought not to be kept up in time of peace, WITHOUT THE CONSENT OF THE LEGISLATURE. I call them unnecessary, because the reason which had introduced a similar provision into the English Bill of Rights is not applicable to any of the State constitutions. The power of raising armies at all, under those constitutions, can by no construction be deemed to reside anywhere else than in the legislatures themselves; and it was superfluous, if not absurd, to declare that a matter should not be done without the consent of a body which alone had the power of doing it. Accordingly, in some of those constitutions,—and, among others, in that of this State of New York, which has been justly celebrated both in Europe and America as one of the best of the forms of government established in this country,—there is a total silence upon the subject.

It is remarkable that, even in the two States which seem to have meditated an interdiction of military establishments in time of peace, the mode of expression made use of is rather cautionary than prohibitory. It is not said that standing armies *shall not be* kept up, but that they *ought not* to be kept up, in time of peace. This ambiguity of terms appears to have been the result of a conflict between jealousy and conviction; between the desire of excluding such establishments at all events, and the persuasion that an absolute exclusion would be unwise and unsafe.

Can it be doubted that such a provision, whenever the situation of public affairs was understood to require a departure from it, would be interpreted by the legislature into a mere admonition, and would be made to yield to the necessities or supposed necessities of the State? Let the fact already mentioned with respect to Pennsylvania decide. What then (it may be asked) is the use of such a provision, if it cease to operate the moment there is an inclination to disregard it?

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Let us examine whether there be any comparison, in point of efficacy, between the provision alluded to and that which is contained in the new Constitution, for restraining the appropriations of money for military purposes to the period of two years. The former, by aiming at too much, is calculated to effect nothing; the latter, by steering clear of an imprudent extreme and by being perfectly compatible with a proper provision for the exigencies of the nation, will have a salutary and powerful operation.

The legislature of the United States will be *obliged*, by this provision, once at least in every two years, to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter by a formal vote in the face of their constituents. They are not *at liberty* to vest in the executive department permanent funds for the support of an army, if they were even incautious enough to be willing to repose in it so improper a confidence. As the spirit of party in different degrees must be expected to infect all political bodies, there will be, no doubt, persons in the national legislature willing enough to arraign the measures and criminate the views of the majority. The provision for the support of a military force will always be a favorable topic for declamation. As often as the question comes forward, the public attention will be roused and attracted to the subject by the party in opposition; and if the majority should be really disposed to exceed the proper limits, the community will be warned of the danger, and will have an opportunity of taking measures to guard against it. Independent of parties in the national legislature itself, as often as the period of discussion arrived, the State legislatures, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if anything improper appears, to sound the alarm to the

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people, and not only to be the VOICE, but, if necessary, the ARM of discontent.

Schemes to subvert the liberties of a great community *require time* to mature them for execution. An army so large as seriously to menace those liberties could only be formed by progressive augmentations; which would suppose, not merely a temporary combination between the legislature and executive, but a continued conspiracy for a series of time. Is it probable that such a combination would exist at all? Is it probable that it would be persevered in, and transmitted along through all the successive variations in a representative body, which biennial elections would naturally produce in both houses? Is it presumable that every man, the instant he took his seat in the national Senate or House of Representatives, would commence a traitor to his constituents and to his country? Can it be supposed that there would not be found one man discerning enough to detect so atrocious a conspiracy, or bold or honest enough to apprise his constituents of their danger? If such presumptions can fairly be made, there ought at once to be an end of all delegated authority. The people should resolve to recall all the powers they have heretofore parted with out of their own hands, and to divide themselves into as many States as there are counties, in order that they may be able to manage their own concerns in person.

If such suppositions could even be reasonably made, still the concealment of the design for any duration would be impracticable. It would be announced by the very circumstance of augmenting the army to so great an extent in time of profound peace. What colorable reason could be assigned in a country so situated, for such vast augmentations of the military force? It is impossible that the people could be long deceived; and the destruction of the project, and of the projectors, would quickly follow the discovery.

It has been said that the provision which limits the appropriation of money for the support of an army to

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the period of two years would be unavailing, because the Executive, when once possessed of a force large enough to awe the people into submission, would find resources in that very force sufficient to enable him to dispense with supplies from the acts of the legislature. But the question again recurs, upon what pretense could he be put in possession of a force of that magnitude in time of peace? If we suppose it to have been created in consequence of some domestic insurrection or foreign war, then it becomes a case not within the principles of the objection; for this is leveled against the power of keeping up troops in time of peace. Few persons will be so visionary as seriously to contend that military forces ought not to be raised to quell a rebellion or resist an invasion; and if the defense of the community under such circumstances should make it necessary to have an army so numerous as to hazard its liberty, this is one of those calamities for which there is neither preventative nor cure. It cannot be provided against by any possible form of government; it might even result from a simple league offensive and defensive, if it should ever be necessary for the confederates or allies to form an army for common defense.

But it is an evil infinitely less likely to attend us in a united than in a disunited state; nay, it may be safely asserted that it is an evil altogether unlikely to attend us in the latter situation. It is not easy to conceive a possibility that dangers so formidable can assail the whole Union as to demand a force considerable enough to place our liberties in the least jeopardy, especially if we take into our view the aid to be derived from the militia, which ought always to be counted upon as a valuable and powerful auxiliary. But in a state of disunion (as has been fully shown in another place), the contrary of this supposition would become not only probable, but almost unavoidable.

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No. 27. (*New York Packet*, December 25, 1787.) Hamilton.

IMPOSSIBILITY OF A NATIONAL GOVERNMENT WITHOUT A NATIONAL FORCE.

Alleged disinclination of the people to federal authority—A people's obedience to a government proportioned to its goodness or badness—Likelihood that the general government will be better administered than the governments of the states—Especial value of the national senate—Greater power of the nation in controlling sedition and faction—Government should be felt by citizens—Certainty that a union will need to employ force less often than separate confederacies—The general government able to use ordinary legal processes—Peculiar advantage enjoyed by national laws.

To the People of the State of New York:

It has been urged, in different shapes, that a Constitution of the kind proposed by the convention cannot operate without the aid of a military force to execute its laws. This, however, like most other things that have been alleged on that side, rests on mere general assertion unsupported by any precise or intelligible designation of the reasons upon which it is founded. As far as I have been able to divine the latent meaning of the objectors, it seems to originate in a presupposition that the people will be disinclined to the exercise of federal authority in any matter of an internal nature. Waiving any exception that might be taken to the inaccuracy or inexplicitness of the distinction between internal and external, let us inquire what ground there is to presuppose that disinclination in the people. Unless we presume at the same time that the powers of the general government will be worse administered than those of the State government, there seems to be no room for the presumption of ill will, disaffection, or opposition in the people. I believe it may be laid down as a general rule that their confidence in and obedience to a government will commonly be proportioned to the goodness or badness of its administration. It must be admitted that there are exceptions to this rule; but these exceptions depend so entirely on

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accidental causes that they cannot be considered as having any relation to the intrinsic merits or demerits of a constitution. These can only be judged of by general principles and maxims.

Various reasons have been suggested, in the course of these papers, to induce a probability that the general government will be better administered than the particular governments: the principal of which reasons are that the extension of the spheres of election will present a greater option or latitude of choice to the people; that through the medium of the State legislatures—which are select bodies of men, and which are to appoint the members of the national Senate—there is reason to expect that this branch will generally be composed with peculiar care and judgment; that these circumstances promise greater knowledge and more extensive information in the national councils, and that they will be less apt to be tainted by the spirit of faction, and more out of the reach of those occasional ill humors, or temporary prejudices and propensities which, in smaller societies, frequently contaminate the public councils, beget injustice and oppression of a part of the community, and engender schemes which, though they gratify a momentary inclination or desire, terminate in general distress, dissatisfaction, and disgust. Several additional reasons of considerable force to fortify that probability will occur when we come to survey with a more critical eye the interior structure of the edifice which we are invited to erect. It will be sufficient here to remark that, until satisfactory reasons can be assigned to justify an opinion that the federal government is likely to be administered in such a manner as to render it odious or contemptible to the people, there can be no reasonable foundation for the supposition that the laws of the Union will meet with any greater obstruction from them, or will stand in need of any other methods to enforce their execution, than the laws of the particular members.

The hope of impunity is a strong incitement to sedition; the dread of punishment, a proportionably strong dis-

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couragement to it. Will not the government of the Union—which, if possessed of a due degree of power, can call to its aid the collective resources of the whole Confederacy—be more likely to repress the *former* sentiment and to inspire the *latter*, than that of a single State, which can only command the resources within itself? A turbulent faction in a State may easily suppose itself able to contend with the friends to the government in that State; but it can hardly be so infatuated as to imagine itself a match for the combined efforts of the Union. If this reflection be just, there is less danger of resistance from irregular combinations of individuals to the authority of the Confederacy than to that of a single member.[1]

I will in this place hazard an observation which will not be the less just because to some it may appear new: which is that the more the operations of the national authority are intermingled in the ordinary exercise of government, the more the citizens are accustomed to meet with it in the common occurrences of their political life; the more it is familiarized to their sight and to their feelings; the further it enters into those objects which touch the most sensible chords and put in motion the most active springs of the human heart; the greater will be the probability that it will conciliate the respect and attachment of the community. Man is very much a creature of habit. A thing that rarely strikes his senses will generally have but little influence upon his mind. A government continually at a distance and out of sight

[1] This has been curiously shown by the distinction in the public mind between "Regulars" and "Militia." In both the great railroad strikes of 1877 and 1894 the rioters resisted bitterly the local militia, but with the appearance of United States troops, though they numbered no more than the militia, actual resistance ceased. The same circumstance was shown in the London "unemployed-riots" of 1888, when the feeling of the mob toward the police was exceedingly bitter; but the moment the Guards appeared, the angry rioters began to joke with them. The psychological difference between resisting local administration and resisting the nation is enormous, for the less a man knows, the more he is governed by his imagination. So long as secession was under discussion as a constitutional question, the masses could take no part, but when the flag was fired on, they understood the issue more clearly than many of the leaders.—EDITOR.

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can hardly be expected to interest the sensations of the people.[1] The inference is that the authority of the Union, and the affections of the citizens toward it, will be strengthened rather than weakened by its extension to what are called matters of internal concern; and will have less occasion to recur to force, in proportion to the familiarity and comprehensiveness of its agency. The more it circulates through those channels and currents in which the passions of mankind naturally flow, the less will it require the aid of the violent and perilous expedients of compulsion.

One thing at all events must be evident, that a government like the one proposed would bid much fairer to avoid the necessity of using force than that species of league contended for by most of its opponents, the authority of which should only operate upon the States in their political or collective capacities. It has been shown that in such a Confederacy there can be no sanction for the laws but force; that frequent delinquencies in the members are the natural

See No. 16.

[1] This mental attitude furnishes the text to one of the most brilliant sections of Bagehot's "English Constitution," in which he points out that the government of England is dual, possessing a "dignified part" and an "efficient part"; the former being supplied by the sovereign, and the latter by the working administration. The dignified part, he maintains, commands that loyalty and reverence by which alone the larger part of the people is controlled; the lack of this he considers a great defect in Presidential government. Yet the example of Great Britain itself during the Commonwealth, if not of France and the United States, should have shown him that what truly commands the loyalty and reverence of a people is the real nationality of which, in England, the sovereign happens to be the most obvious expression. Seeley in his "Life of Stein" draws the distinction that Napoleon was able repeatedly to conquer Italy, Germany, and Austria because there was, in those countries at that time, no true sense of nationality; but in Spain and Russia, where the contrary was true, Napoleon failed signally. Yet all these countries were equally equipped with royalty. How the sense of loyalty has grown in the United States, not through reverence for a figurehead, but through a greater and greater consciousness of actual nationality, is a most interesting study. Von Holst marvels at the outburst of "worship of the constitution" which developed almost with its adoption, and nowadays there is much satirical writing about the sentiment for "the flag"; yet each form of loyalty is but a surface expression of a far deeper feeling, corresponding exactly to what Bagehot superficially believed to be merely a reverence for the Queen.—EDITOR.

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offspring of the very frame of the government; and that as often as these happen, they can only be redressed, if at all, by war and violence.

The plan reported by the convention, by extending the authority of the federal head to the individual citizens of the several States, will enable the government to employ the ordinary magistracy of each in the execution of its laws. It is easy to perceive that this will tend to destroy, in the common apprehension, all distinction between the sources from which they might proceed; and will give the federal government the same advantage for securing a due obedience to its authority which is enjoyed by the government of each State, in addition to the influence on public opinion which will result from the important consideration of its having power to call to its assistance and support the resources of the whole Union. It merits particular attention in this place, that the laws of the Confederacy, as to the *enumerated* and *legitimate* objects of its jurisdiction, will become the SUPREME LAW of the land, to the observance of which all officers—legislative, executive, and judicial, in each State—will be bound by the sanctity of an oath. Thus the legislatures, courts, and magistrates of the respective members will be incorporated into the operations of the national government *as far as its just and constitutional authority extends*, and will be rendered auxiliary to the enforcement of its laws.* Any man who will pursue by his own reflections the consequences of this situation will perceive that there is good ground to calculate upon a regular and peaceable execution of the laws of the Union, if its powers are administered with a common share of prudence. If we will arbitrarily suppose the contrary, we may deduce any inferences we please from the supposition; for it is certainly possible, by an injudicious exercise of the authorities of the best government that ever was, or ever can be instituted, to provoke and precipitate the people into

* The sophistry which has been employed, to show that this will tend to the destruction of the State governments, will, in its proper place, be fully detected.—PUBLIUS.

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the wildest excesses. But though the adversaries of the proposed Constitution should presume that the national rulers would be insensible to the motives of public good or to the obligations of duty, I would still ask them how the interests of ambition or the views of encroachment can be promoted by such a conduct?

PUBLIUS.

No. 28. (*Independent Journal*, December 26, 1787.) Hamilton.

CONDITIONS WHICH NECESSITATE A NATIONAL FORCE.

Insurrections a malady inseparable from the body politic—An insurrection a danger to all government—Experience of Massachusetts and Pennsylvania—New York versus Vermont—Separate confederacies subject to same conditions as the Union—A full answer to objection is that the power is in the hands of the representatives of the people—Certain success of popular resistance to usurpation—Advantage of large territory and of state government—Impossibility of a large standing army.

To the People of the State of New York:

That there may happen cases in which the national government may be necessitated to resort to force, cannot be denied. Our own experience has corroborated the lessons taught by the examples of other nations; that emergencies of this sort will sometimes arise in all societies, however constituted; that seditions and insurrections are, unhappily, maladies as inseparable from the body politic as tumors and eruptions from the natural body; that the idea of governing at all times by the simple force of law (which we have been told is the only admissible principle of republican government) has no place but in the reveries of those political doctors whose sagacity disdains the admonitions of experimental instruction.

Should such emergencies at any time happen under the national government, there could be no remedy but force. The means to be employed must be proportioned

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to the extent of the mischief. If it should be a slight commotion in a small part of a State, the militia of the residue would be adequate to its suppression; and the natural presumption is that they would be ready to do their duty. An insurrection, whatever may be its immediate cause, eventually endangers all government. Regard to the public peace, if not to the rights of the Union, would engage the citizens to whom the contagion had not communicated itself, to oppose the insurgents; and if the general government should be found in practice conducive to the prosperity and felicity of the people, it were irrational to believe that they would be disinclined to its support.

If, on the contrary, the insurrection should pervade a whole State, or a principal part of it, the employment of a different kind of force might become unavoidable. It appears that Massachusetts found it necessary to raise troops for repressing the disorders within that State; that Pennsylvania, from the mere apprehension of commotions among a part of her citizens, has thought proper to have recourse to the same measure. Suppose the State of New York had been inclined to re-establish her lost jurisdiction over the inhabitants of Vermont, could she have hoped for success in such an enterprise from the efforts of the militia alone? Would she not have been compelled to raise and to maintain a more regular force for the execution of her design? If it must then be admitted that the necessity of recurring to a force different from the militia, in cases of this extraordinary nature, is applicable to the State governments themselves, why should the possibility that the national government might be under a like necessity, in similar extremities, be made an objection to its existence? Is it not surprising that men who declare an attachment to the Union in the abstract should urge as an objection to the proposed Constitution what applies with tenfold weight to the plan for which they contend; and what, as far as it has any foundation in truth, is an inevitable consequence of civil society upon an enlarged scale? Who

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would not prefer that possibility to the unceasing agitations and frequent revolutions which are the continual scourges of petty republics?

Let us pursue this examination in another light. Suppose, in lieu of one general system, two, or three, or even four Confederacies were to be formed, would not the same difficulty oppose itself to the operations of either of these Confederacies? Would not each of them be exposed to the same casualties; and when these happened, be obliged to have recourse to the same expedients for upholding its authority which are objected to in a government for all the States? Would the militia, in this supposition, be more ready or more able to support the federal authority than in the case of a general union? All candid and intelligent men must, upon due consideration, acknowledge that the principle of the objection is equally applicable to either of the two cases; and that, whether we have one government for all the States, or different governments for different parcels of them, or even if there should be an entire separation of the States,[1] there might sometimes be a necessity to make use of a force constituted differently from the militia, to preserve the peace of the community and to maintain the just authority of the laws against those violent invasions of them which amount to insurrections and rebellions.

Independent of all other reasonings upon the subject, it is a full answer to those who require a more peremptory provision against military establishments in time of peace, to say that the whole power of the proposed government is to be in the hands of the representatives of the people. This is the essential, and, after all, only efficacious security for the rights and privileges of the people which is attainable in civil society.*

If the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense which is

* Its full efficacy will be examined hereafter.—PUBLIUS.

[1] In the text of the edition of 1802, "or if there should be as many unconnected governments as there are States."—EDITOR.

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paramount to all positive forms of government, and which against the usurpations of the national rulers may be exerted with infinitely better prospect of success than against those of the rulers of an individual state. In a single state, if the persons intrusted with supreme power become usurpers, the different parcels, subdivisions, or districts of which it consists, having no distinct government in each, can take no regular measures for defense. The citizens must rush tumultuously to arms, without concert, without system, without resource—except in their courage and despair. The usurpers, clothed with the forms of legal authority, can too often crush the opposition in embryo. The smaller the extent of the territory, the more difficult will it be for the people to form a regular or systematic plan of opposition, and the more easy will it be to defeat their early efforts. Intelligence can be more speedily obtained of their preparations and movements, and the military force in the possession of the usurpers can be more rapidly directed against the part where the opposition has begun. In this situation there must be a peculiar coincidence of circumstances to insure success to the popular resistance.

The obstacles to usurpation and the facilities of resistance increase with the increased extent of the state, provided the citizens understand their rights and are disposed to defend them. The natural strength of the people in a large community, in proportion to the artificial strength of the government, is greater than in a small, and of course more competent to a struggle with the attempts of the government to establish a tyranny. But in a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of

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the other as the instrument of redress. How wise will it be in them, by cherishing the union, to preserve to themselves an advantage which can never be too highly prized!

It may safely be received as an axiom in our political system that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority. Projects of usurpation cannot be masked under pretenses so likely to escape the penetration of select bodies of men as of the people at large. The legislatures will have better means of information. They can discover the danger at a distance; and possessing all the organs of civil power, and the confidence of the people, they can at once adopt a regular plan of opposition, in which they can combine all the resources of the community. They can readily communicate with each other in the different States, and unite their common forces for the protection of their common liberty.[1]

The great extent of the country is a further security. We have already experienced its utility against the attacks of a foreign power. And it would have precisely the same effect against the enterprises of ambitious rulers in the national councils. If the federal army should be able to quell the resistance of one State, the distant States would have it in their power to make head with fresh forces. The advantages obtained in one place must be abandoned to subdue the opposition in others; and the moment the part which had been reduced to submission was left to itself, its efforts would be renewed, and its resistance revive.

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[1] This has been disproved in history. In the high tide of federalism Sedgwick noted that the democrats were "getting the State Govts into their hands to play them like batteries on the U. S. govt." but no united action could be secured. Frequently the state legislatures have protested against the action of the national government, and have furthermore, when their own interests were at stake (as in the Creek case), not scrupled to oppose by force the will of the national government. But not once has a state come to the aid of another actually resisting the national authority while still holding itself a member of the Union.—EDITOR.

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We should recollect that the extent of the military force must, at all events, be regulated by the resources of the country. For a long time to come it will not be possible to maintain a large army; and as the means of doing this increase, the population and natural strength of the community will proportionably increase. When will the time arrive that the federal government can raise and maintain an army capable of erecting a despotism over the great body of the people of an immense empire, who are in a situation, through the medium of their State governments, to take measures for their own defense, with all the celerity, regularity, and system of independent nations? The apprehension may be considered as a disease, for which there can be found no cure in the resources of argument and reasoning.

PUBLIUS.

No. 29 [35].[1] (*Independent Journal*, January 8, 1788.) Hamilton.

THE POWER OF REGULATING THE MILITIA.

A natural incident to common defense—Uniformity in the militia beneficial—Limited powers of national government concerning state forces—Contention concerning posse comitatus—Absurdity of the militia proving a danger if controlled by general government—Certain grievance of frequent military exercises—Advantage of select corps—The states certain to have a preponderant influence over the militia—Example of publications against the constitution—Exaggerated suggestions concerning misuse of militia—Conduct of militia in case of attempted despotism—The general government alone able to use the militia to protect the states.

To the People of the State of New York:

The power of regulating the militia, and of commanding its services in times of insurrection and invasion, are

[1] This essay appeared as No. XXXV. in the original publication in the newspapers, and is therefore here misplaced chronologically. In the collected edition of 1788, however, it is printed as No. XXIX., which gives it its proper place according to subject, and for this reason the order of the first edition has been followed. Henceforth similar variations will be noted as above.—EDITOR.

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natural incidents to the duties of superintending the common defense, and of watching over the internal peace of the Confederacy.

It requires no skill in the science of war to discern that uniformity in the organization and discipline of the militia would be attended with the most beneficial effects, whenever they were called into service for the public defense. It would enable them to discharge the duties of the camp and of the field with mutual intelligence and concert—an advantage of peculiar moment in the operations of an army; and it would fit them much sooner to acquire the degree of proficiency in military functions which would be essential to their usefulness. This desirable uniformity can only be accomplished by confiding the regulation of the militia to the direction of the national authority. It is, therefore, with the most evident propriety that the plan of the convention proposes to empower the Union "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, *reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.*"

Of the different grounds which have been taken in opposition to the plan of the convention, there is none that was so little to have been expected, or is so untenable in itself, as the one from which this particular provision has been attacked. If a well-regulated militia be the most natural defense of a free country, it ought certainly to be under the regulation and at the disposal of that body which is constituted the guardian of the national security. If standing armies are dangerous to liberty, an efficacious power over the militia, in the body to whose care the protection of the State is committed, ought as far as possible to take away the inducement and the pretext to such unfriendly institutions. If the federal government can command the aid of the militia in those emergencies which call for the military arm in support of the civil magistrate, it can the better dispense with

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the employment of a different kind of force. If it cannot avail itself of the former, it will be obliged to recur to the latter. To render an army unnecessary will be a more certain method of preventing its existence than a thousand prohibitions upon paper.

In order to cast an odium upon the power of calling forth the militia to execute the laws of the Union, it has been remarked that there is nowhere any provision in the proposed Constitution for calling out the POSSE COMITATUS, to assist the magistrate in the execution of his duty; whence it has been inferred that military force was intended to be his only auxiliary. There is a striking incoherence in the objections which have appeared, and sometimes even from the same quarter, not much calculated to inspire a very favorable opinion of the sincerity or fair dealing of their authors. The same persons who tell us, in one breath, that the powers of the federal government will be despotic and unlimited, inform us, in the next, that it has not authority sufficient even to call out the POSSE COMITATUS. The latter, fortunately, is as much short of the truth as the former exceeds it. It would be as absurd to doubt that a right to pass all laws *necessary and proper* to execute its declared powers would include that of requiring the assistance of the citizens to the officers who may be intrusted with the execution of those laws, as it would be to believe that a right to enact laws necessary and proper for the imposition and collection of taxes would involve that of varying the rules of descent and of the alienation of landed property, or of abolishing the trial by jury in cases relating to it. It being therefore evident that the supposition of a want of power to require the aid of the POSSE COMITATUS is entirely destitute of color, it will follow that the conclusion which has been drawn from it, in its application to the authority of the federal government over the militia, is as uncandid as it is illogical. What reason could there be to infer that force was intended to be the sole instrument of authority, merely because there is a power to make use of it when necessary? What shall we think

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of the motives which could induce men of sense to reason in this manner? How shall we prevent a conflict between charity and judgment?

By a curious refinement upon the spirit of republican jealousy, we are even taught to apprehend danger from the militia itself, in the hands of the federal government. It is observed that select corps may be formed, composed of the young and ardent, who may be rendered subservient to the views of arbitrary power.[1] What plan for the regulation of the militia may be pursued by the national government is impossible to be foreseen. But so far from viewing the matter in the same light with those who object to select corps as dangerous, were the Constitution ratified, and were I to deliver my sentiments to a member of the federal legislature from this State on the subject of a militia establishment, I should hold to him, in substance, the following discourse:

"The project of disciplining all the militia of the United States is as futile as it would be injurious, if it were capable of being carried into execution. A tolerable expertness in military movements is a business that requires time and practice. It is not a day, or even a week, that will suffice for the attainment of it. To oblige the great body of the yeomanry, and of the other classes of the citizens, to be under arms for the purpose of going through military exercises and evolutions, as often as

[1] In 1805 Jefferson proposed this very scheme of a classified militia, and was so eager for it that he drafted a bill, and endeavored to force it through Congress (see "Writings of Jefferson," Ford's edition, viii. 409), but it was defeated by his own party, through fear of the uses to which the "young and ardent" might be put. The unpopularity of the war of 1812 served largely to make ridiculous and break down the old militia laws, which compelled universal drill once or twice a year; and this feeling slowly extended throughout the country, until at the beginning of the Civil War little was left of the old idea of a manhood militia. Finally the older method has been entirely superseded by a volunteer militia made up almost wholly of the "young and ardent," and with this development has come the very improvement here suggested, for the new National Guard, unlike the old country militia, have become not merely expert troops, but have, in proportion to their improved discipline, sunk their "local" views and prejudices in an *esprit de corps* which has made the best of them as trustworthy as regulars in quelling the discontent of their own neighborhoods.—EDITOR.

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might be necessary to acquire the degree of perfection which would entitle them to the character of a well-regulated militia, would be a real grievance to the people, and a serious public inconvenience and loss. It would form an annual deduction from the productive labor of the country, to an amount which, calculating upon the present numbers of the people, would not fall far short of the whole expense of the civil establishments of all the States. To attempt a thing which would abridge the mass of labor and industry to so considerable an extent would be unwise: and the experiment, if made, could not succeed, because it would not long be endured. Little more can reasonably be aimed at, with respect to the people at large, than to have them properly armed and equipped; and in order to see that this be not neglected, it will be necessary to assemble them once or twice in the course of a year.

"But though the scheme of disciplining the whole nation must be abandoned as mischievous or impracticable; yet it is a matter of the utmost importance that a well-digested plan should, as soon as possible, be adopted for the proper establishment of the militia. The attention of the government ought particularly to be directed to the formation of a select corps of moderate extent, upon such principles as will really fit them for service in case of need. By thus circumscribing the plan, it will be possible to have an excellent body of well-trained militia, ready to take the field whenever the defense of the State shall require it. This will not only lessen the call for military establishments, but if circumstances should at any time oblige the government to form an army of any magnitude, that army can never be formidable to the liberties of the people while there is a large body of citizens, little, if at all, inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow-citizens. This appears to me the only substitute that can be devised for a standing army, and the best possible security against it, if it should exist."

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Thus differently from the adversaries of the proposed Constitution should I reason on the same subject, deducing arguments of safety from the very sources which they represent as fraught with danger and perdition. But how the national legislature may reason on the point, is a thing which neither they nor I can foresee.

There is something so far-fetched and so extravagant in the idea of danger to liberty from the militia, that one is at a loss whether to treat it with gravity or with raillery; whether to consider it as a mere trial of skill, like the paradoxes of rhetoricians; as a disingenuous artifice to instill prejudices at any price; or as the serious offspring of political fanaticism. Where, in the name of common sense, are our fears to end if we may not trust our sons, our brothers, our neighbors, our fellow-citizens? What shadow of danger can there be from men who are daily mingling with the rest of their countrymen, and who participate with them in the same feelings, sentiments, habits, and interests? What reasonable cause of apprehension can be inferred from a power in the Union to prescribe regulations for the militia, and to command its services when necessary, while the particular States are to have the *sole and exclusive appointment of the officers?* If it were possible seriously to indulge a jealousy of the militia upon any conceivable establishment under the federal government, the circumstance of the officers being in the appointment of the States ought at once to extinguish it. There can be no doubt that this circumstance will always secure to them a preponderating influence over the militia.

In reading many of the publications against the Constitution, a man is apt to imagine that he is perusing some ill-written tale or romance, which, instead of natural and agreeable images, exhibits to the mind nothing but frightful and distorted shapes—

"Gorgons, hydras, and chimeras dire";

discoloring and disfiguring whatever it represents, and transforming everything it touches into a monster.

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A sample of this is to be observed in the exaggerated and improbable suggestions which have taken place respecting the power of calling for the services of the militia. That of New Hampshire is to be marched to Georgia, of Georgia to New Hampshire, of New York to Kentucky, and of Kentucky to Lake Champlain. Nay, the debts due to the French and Dutch are to be paid in militiamen instead of louis d'ors and ducats. At one moment there is to be a large army to lay prostrate the liberties of the people; at another moment the militia of Virginia are to be dragged from their homes five or six hundred miles to tame the republican contumacy of Massachusetts; and that of Massachusetts is to be transported an equal distance to subdue the refractory haughtiness of the aristocratic Virginians. Do the persons who rave at this rate imagine that their art or their eloquence can impose any conceits or absurdities upon the people of America for infallible truths? [1]

If there should be an army to be made use of as the engine of despotism, what need of the militia? If there should be no army, whither would the militia, irritated by being called upon to undertake a distant and hopeless expedition for the purpose of riveting the chains of slavery upon a part of their countrymen, direct their

[1] The history of our militia has shown how useless it is to employ them in any object of which they do not approve. In 1794 the Governor of Pennsylvania notified the President that it would be impossible to crush the whisky insurrection with the local militia, for they too strongly sympathized with the movement to be trusted to quell it. The refusal of the militia of New York to invade Canada in 1812, and the whole course of the New England militia during the war of 1812, were still more striking. In 1861, while certain northern states voluntarily offered their whole militias to the national government, the President's call upon the states for seventy-five thousand men drove certain states which had hitherto remained passive into secession, and though certain border states did not take this extreme action, they paid no heed to the call, and it is to be questioned if this was any loss to the effectual strength. As already noted, the new National Guard is far less influenced by local sentiment; but that some of the old virus still lingers in certain sections was shown in the great railroad strike of 1894, when certain California regiments, called out to protect the extremely unpopular Southern Pacific Railroad, not merely neglected to defend the road, but, it was even alleged, actually aided the strikers in the destruction of property.—EDITOR.

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course, but to the seat of the tyrants who had meditated so foolish as well as so wicked a project, to crush them in their imagined intrenchments of power, and to make them an example of the just vengeance of an abused and incensed people? Is this the way in which usurpers stride to dominion over a numerous and enlightened nation? Do they begin by exciting the detestation of the very instruments of their intended usurpations? Do they usually commence their career by wanton and disgustful acts of power, calculated to answer no end but to draw upon themselves universal hatred and execration? Are suppositions of this sort the sober admonitions of discerning patriots to a discerning people? Or are they the inflammatory ravings of incendiaries or distempered enthusiasts? If we were even to suppose the national rulers actuated by the most ungovernable ambition, it is impossible to believe that they would employ such preposterous means to accomplish their designs.

In times of insurrection or invasion, it would be natural and proper that the militia of a neighboring State should be marched into another, to resist a common enemy, or to guard the republic against the violence of faction or sedition. This was frequently the case, in respect to the first object, in the course of the late war; and this mutual succor is, indeed, a principal end of our political association. If the power of affording it be placed under the direction of the Union, there will be no danger of a supine and listless inattention to the dangers of a neighbor till its near approach had superadded the incitements of self-preservation to the too feeble impulses of duty and sympathy.

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No. 30 [29]. (*New York Packet*, December 28, 1787.) Hamilton.

GENERAL POWER OF NATIONAL TAXATION.

National needs for revenue—Money the vital requisite in government—Evils resulting from lack of revenue—Example of the Turkish empire—Example in breakdown of confederation—Revenue unlimited under articles of confederation—Erroneous principles in that compact—Consequences of the system—A remedy in abandonment of quotas and requisitions—The wished-for distinction between internal and external taxes—The fundamental principle of national government—The resources of a nation equal to its necessities—Proposition to supply the deficiencies in external taxes by requisition—Result of limited taxation in times of war—The national government should possess an unrestrained power of taxation—The power of taxation a certain means of borrowing.

To the People of the State of New York:

It has been already observed that the federal government ought to possess the power of providing for the support of the national forces; in which proposition was intended to be included the expense of raising troops, of building and equipping fleets, and all other expenses in any wise connected with military arrangements and operations. But these are not the only objects to which the jurisdiction of the Union, in respect to revenue, must necessarily be empowered to extend. It must embrace a provision for the support of the national civil list; for the payment of the national debts contracted, or that may be contracted; and in general, for all those matters which will call for disbursements out of the national treasury. The conclusion is that there must be interwoven in the frame of the government a general power of taxation, in one shape or another.

Money is with propriety considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most essential functions. A complete power, therefore, to procure a regular and adequate supply of it, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution. From a

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deficiency in this particular, one of two evils must ensue: either the people must be subjected to continual plunder as a substitute for a more eligible mode of supplying the public wants, or the government must sink into a fatal atrophy, and, in a short course of time, perish.

In the Ottoman or Turkish empire, the sovereign, though in other respects absolute master of the lives and fortunes of his subjects, has no right to impose a new tax. The consequence is that he permits the bashaws or governors of provinces to pillage the people without mercy; and, in turn, squeezes out of them the sums of which he stands in need to satisfy his own exigencies and those of the state. In America, from a like cause, the government of the Union has gradually dwindled into a state of decay approaching nearly to annihilation. Who can doubt that the happiness of the people in both countries would be promoted by competent authorities in the proper hands, to provide the revenues which the necessities of the public might require?

The present Confederation, feeble as it is, intended to repose in the United States an unlimited power of providing for the pecuniary wants of the Union. But proceeding upon an erroneous principle, it has been done in such a manner as entirely to have frustrated the intention. Congress, by the articles which compose that compact (as has already been stated), are authorized to ascertain and call for any sums of money necessary, in their judgment, to the service of the United States; and their requisitions, if comformable to the rule of apportionment, are in every constitutional sense obligatory upon the States. These have no right to question the propriety of the demand; no discretion beyond that of devising the ways and means of furnishing the sums demanded. But though this be strictly and truly the case; though the assumption of such a right would be an infringement of the articles of Union; though it may seldom or never have been avowedly claimed, yet in practice it has been constantly exercised, and would continue to be so, as long as the revenues of the Confederacy should remain

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dependent on the intermediate agency of its members. What the consequences of this system have been is within the knowledge of every man the least conversant in our public affairs, and has been amply unfolded in different parts of these inquiries. It is this which has chiefly contributed to reduce us to a situation which affords ample cause both of mortification to ourselves and of triumph to our enemies.

What remedy can there be for this situation, but in a change of the system which has produced it—in a change of the fallacious and delusive system of quotas and requisitions? What substitute can there be imagined for this *ignis fatuus* in finance, but that of permitting the national government to raise its own revenues by the ordinary methods of taxation authorized in every well-ordered constitution of civil government? Ingenious men may declaim with plausibility on any subject; but no human ingenuity can point out any other expedient to rescue us from the inconveniences and embarrassments naturally resulting from defective supplies of the public treasury.

The more intelligent adversaries of the new Constitution admit the force of this reasoning; but they qualify their admission by a distinction between what they call *internal* and *external* taxation. The former they would reserve to the State governments; the latter, which they explain into commercial imposts, or rather duties on imported articles, they declare themselves willing to concede to the federal head. This distinction, however, would violate the maxim of good sense and sound policy which dictates that every POWER ought to be in proportion to its OBJECT; and would still leave the general government in a kind of tutelage to the State governments, inconsistent with every idea of vigor or efficiency. Who can pretend that commercial imposts are, or would be, alone equal to the present and future exigencies of the Union? Taking into the account the existing debt, foreign and domestic, upon any plan of extinguishment which a man moderately impressed with the importance of public justice and public credit could approve, in

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addition to the establishments which all parties will acknowledge to be necessary, we could not reasonably flatter ourselves that this resource alone, upon the most improved scale, would even suffice for its present necessities. Its future necessities admit not of calculation or limitation; and upon the principle, more than once adverted to, the power of making provision for them as they arise ought to be equally unconfined. I believe it may be regarded as a position warranted by the history of mankind, that, *in the usual progress of things, the necessities of a nation, in every stage of its existence, will be found at least equal to its resources.*

To say that deficiencies may be provided for by requisitions upon the States is on the one hand to acknowledge that this system cannot be depended upon, and on the other hand to depend upon it for everything beyond a certain limit. Those who have carefully attended to its vices and deformities, as they have been exhibited by experience or delineated in the course of these papers, must feel invincible repugnancy to trusting the national interests in any degree to its operation. Its inevitable tendency, whenever it is brought into activity, must be to enfeeble the Union and sow the seeds of discord and contention between the federal head and its members, and between the members themselves. Can it be expected that the deficiencies would be better supplied in this mode than the total wants of the Union have heretofore been supplied in the same mode? It ought to be recollected that if less will be required from the States, they will have proportionably less means to answer the demand. If the opinions of those who contend for the distinction which has been mentioned were to be received as evidence of truth, one would be led to conclude that there was some known point in the economy of national affairs at which it would be safe to stop and to say: Thus far the ends of public happiness will be promoted by supplying the wants of government, and all beyond this is unworthy of our care or anxiety. How is it possible that a government half supplied and

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always necessitous can fulfill the purposes of its institution, can provide for the security, advance the prosperity, or support the reputation of the commonwealth? How can it ever possess either energy or stability, dignity or credit, confidence at home or respectability abroad? How can its administration be anything else than a succession of expedients temporizing, impotent, disgraceful? How will it be able to avoid a frequent sacrifice of its engagements to immediate necessity? How can it undertake or execute any liberal or enlarged plans of public good?

Let us attend to what would be the effects of this situation in the very first war in which we should happen to be engaged. We will presume, for argument's sake, that the revenue arising from the impost duties answers the purposes of a provision for the public debt and of a peace establishment for the Union. Thus circumstanced, a war breaks out.[1] What would be the probable conduct of the government in such an emergency? Taught by experience that proper dependence could not be placed on the success of requisitions, unable by its own authority to lay hold of fresh resources, and urged by considerations of national danger, would it not be driven to the expedient of diverting the funds already appropriated from their proper objects to the defense of the State? It is not easy to see how a step of this kind could be avoided; and if it should be taken, it is evident that it would prove the destruction of public credit at the very moment that it was becoming essential to the public safety. To imagine that at such a crisis credit might be dispensed with, would be the extreme of infatuation. In the modern system of war nations the most wealthy are obliged to have recourse to large loans. A country so little opulent as ours must feel this necessity in a much stronger degree. But who would lend to a government

[1] This was well proved by the war of 1812, when, owing to the interruption of commerce, and especially to the blockade, the imports fell off to such an extent as made the duties wholly inadequate to the ordinary expenses of government, far more inadequate to those entailed by a state of war.—EDITOR.

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that prefaced its overtures for borrowing by an act which demonstrated that no reliance could be placed on the steadiness of its measures for paying? The loans it might be able to procure would be as limited in their extent as burdensome in their conditions. They would be made upon the same principles that usurers commonly lend to bankrupt and fraudulent debtors—with a sparing hand and at enormous premiums.

It may perhaps be imagined that, from the scantiness of the resources of the country, the necessity of diverting the established funds, in the case supposed, would exist, though the national government should possess an unrestrained power of taxation. But two considerations will serve to quiet all apprehension on this head: one is that we are sure the resources of the community, in their full extent, will be brought into activity for the benefit of the Union; the other is that whatever deficiencies there may be can without difficulty be supplied by loans.

The power of creating new funds upon new objects of taxation, by its own authority, would enable the national government to borrow as far as its necessities might require. Foreigners, as well as the citizens of America, could then reasonably repose confidence in its engagements; but to depend upon a government that must itself depend upon thirteen other governments for the means of fulfilling its contracts, when once its situation is clearly understood, would require a degree of credulity not often to be met with in the pecuniary transactions of mankind, and little reconcilable with the usual sharp-sightedness of avarice.

Reflections of this kind may have trifling weight with men who hope to see realized in America the halcyon scenes of the poetic or fabulous age; but to those who believe we are likely to experience a common portion of the vicissitudes and calamities which have fallen to the lot of other nations, they must appear entitled to serious attention. Such men must behold the actual situation of their country with painful solicitude, and deprecate the evils which ambition or revenge might, with too much facility, inflict upon it. PUBLIUS.

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No. 31 [30]. (*New York Packet*, January 1, 1788.) Hamilton.

UNLIMITED NATIONAL TAXATION NOT A ROAD TO DESPOTISM.

Principles of logic applied to the necessity of general power of taxation—Recapitulation of the necessity of unlimited national revenues—View of the opponents of the constitution—Necessity of revenue for local administration—Probable absorption of all taxation by national government—Improbability of usurpations by the federal government—Why not in state governments as well?—Disposition of the state governments to encroach on the Union—State governments will probably possess most influence over people—The people alone can preserve the equilibrium between the general and state government.

To the People of the State of New York:

In disquisitions of every kind there are certain primary truths or first principles, upon which all subsequent reasonings must depend. These contain an internal evidence which, antecedent to all reflection or combination, commands the assent of the mind. Where it produces not this effect, it must proceed either from some defect or disorder in the organs of perception, or from the influence of some strong interest, or passion, or prejudice. Of this nature are the maxims in geometry, that "the whole is greater than its part; things equal to the same are equal to one another; two straight lines cannot inclose a space; and all right angles are equal to each other." Of the same nature are these other maxims in ethics and politics, that there cannot be an effect without a cause; that the means ought to be proportioned to the end; that every power ought to be commensurate with its object; that there ought to be no limitation of a power destined to effect a purpose which is itself incapable of limitation. And there are other truths in the two latter sciences which, if they cannot pretend to rank in the class of axioms, are yet such direct inferences from them, and so obvious in themselves, and so agreeable to the natural and unsophisticated dictates of common sense, that they challenge the assent of a sound and unbiased mind with a degree of force and conviction almost equally irresistible.

The objects of geometrical inquiry are so entirely abstracted from those pursuits which stir up and put in motion the unruly passions of the human heart, that mankind, without difficulty, adopt not only the more simple theorems of the science but even those abstruse paradoxes which, however they may appear susceptible

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of demonstration, are at variance with the natural conceptions which the mind, without the aid of philosophy, would be led to entertain upon the subject. The INFINITE DIVISIBILITY of matter, or, in other words, the INFINITE divisibility of a FINITE thing, extending even to the minutest atom, is a point agreed among geometricians, though not less incomprehensible to common sense than any of those mysteries in religion against which the batteries of infidelity have been so industriously leveled.

But in the sciences of morals and politics men are found far less tractable. To a certain degree it is right and useful that this should be the case. Caution and investigation are a necessary armor against error and imposition. But this untractableness may be carried too far, and may degenerate into obstinacy, perverseness, or disingenuity. Though it cannot be pretended that the principles of moral and political knowledge have, in general, the same degree of certainty with those of the mathematics, yet they have much better claims in this respect than, to judge from the conduct of men in particular situations, we should be disposed to allow them. The obscurity is much oftener in the passions and prejudices of the reasoner than in the subject. Men, upon too many occasions, do not give their own understandings fair play; but, yielding to some untoward bias, they entangle themselves in words and confound themselves in subtleties.

How else could it happen (if we admit the objectors to be sincere in their opposition) that positions so clear as those which manifest the necessity of a general power of taxation in the government of the Union, should have to encounter any adversaries among men of discernment? Though these positions have been elsewhere fully stated, they will perhaps not be improperly recapitulated in this place, as introductory to an examination of what may have been offered by way of objection to them. They are in substance as follows:

A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible, free from every other control but a regard to the public good and to the sense of the people.

As the duties of superintending the national defense and of securing the public peace against foreign or domestic violence involve a provision for casualties and dangers to which no possible limits can be assigned, the power of making that provision ought to know no other bounds than the exigencies of the nation and the resources of the community.

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As revenue is the essential engine by which the means of answering the national exigencies must be procured, the power of procuring that article in its full extent must necessarily be comprehended in that of providing for those exigencies.

As theory and practice conspire to prove that the power of procuring revenue is unavailing when exercised over the States in their collective capacities, the federal government must of necessity be invested with an unqualified power of taxation in the ordinary modes.

Did not experience evince the contrary, it would be natural to conclude that the propriety of a general power of taxation in the national government might safely be permitted to rest on the evidence of these propositions, unassisted by any additional arguments or illustrations. But we find, in fact, that the antagonists of the proposed Constitution, so far from acquiescing in their justness or truth, seem to make their principal and most zealous effort against this part of the plan. It may therefore be satisfactory to analyze the arguments with which they combat it.

Those of them which have been most labored with that view, seem in substance to amount to this: "It is not true, because the exigencies of the Union may not be susceptible of limitation, that its power of laying taxes ought to be unconfined. Revenue is as requisite to the purposes of the local administrations as those of the Union; and the former are at least of equal importance with the latter to the happiness of the people. It is, therefore, as necessary that the State governments should be able to command the means of supplying their wants as that the national government should possess the like faculty in respect to the wants of the Union. But an indefinite power of taxation in the *latter* might and probably would, in time, deprive the *former* of the means of providing for their own necessities; and would subject them entirely to the mercy of the national legislature. As the laws of the Union are to become the supreme law of the land, as it is to have power to pass all laws that may be NECESSARY for carrying into execution the authorities with which it is proposed to vest it, the national government might at any time abolish the taxes imposed for State objects upon the pretense of an interference with its own. It might allege a necessity of doing this in order to give efficacy to the national revenues. And thus all the resources of taxation might by degrees become the subjects of federal monopoly, to the entire exclusion and destruction of the State governments."

This mode of reasoning appears sometimes to turn upon the

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supposition of usurpation in the national government; at other times it seems to be designed only as a deduction from the constitutional operation of its intended powers. It is only in the latter light that it can be admitted to have any pretensions to fairness. The moment we launch into conjectures about the usurpations of the federal government, we get into an unfathomable abyss, and fairly put ourselves out of the reach of all reasoning. Imagination may range at pleasure till it gets bewildered amidst the labyrinths of an enchanted castle, and knows not on which side to turn to extricate itself from the perplexities into which it has so rashly adventured. Whatever may be the limits or modifications of the powers of the Union, it is easy to imagine an endless train of possible dangers; and by indulging an excess of jealousy and timidity, we may bring ourselves to a state of absolute skepticism and irresolution. I repeat here what I have observed in substance in another place, that all observations founded upon the danger of usurpation ought to be referred to the composition and structure of the government, not to the nature or extent of its powers. The State governments, by their original constitutions, are invested with complete sovereignty. In what does our security consist against usurpation from that quarter? Doubtless in the manner of their formation, and in a due dependence of those who are to administer them upon the people. If the proposed construction of the federal government be found, upon an impartial examination of it, to be such as to afford to a proper extent the same species of security, all apprehensions on the score of usurpation ought to be discarded.

It should not be forgotten that a disposition in the State governments to encroach upon the rights of the Union is quite as probable as a disposition in the Union to encroach upon the rights of the State governments. What side would be likely to prevail in such a conflict, must depend on the means which the contending parties could employ toward securing success. As in republics strength is always on the side of the people, and as there are weighty reasons to induce a belief that the State governments will commonly possess most influence over them, the natural conclusion is that such contests will be most apt to end to the disadvantage of the Union; and that there is greater probability of encroachments by the members upon the federal head than by the federal head upon the members. But it is evident that all conjectures of this kind must be extremely vague and fallible; and that it is by far the safest course to lay them altogether aside, and to confine

See No. 45.

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our attention wholly to the nature and extent of the powers as they are delineated in the Constitution. Everything beyond this must be left to the prudence and firmness of the people; who, as they will hold the scales in their own hands, it is to be hoped, will always take care to preserve the constitutional equilibrium between the general and the State governments. Upon this ground, which is evidently the true one, it will not be difficult to obviate the objections which have been made to an indefinite power of taxation in the United States. PUBLIUS.

No. 32 [31]. (*Independent Journal*, January 2, 1788.) Hamilton.

DIFFERENTIATION OF POWERS BETWEEN NATIONAL AND STATE GOVERNMENTS WITH ESPECIAL RESPECT TO TAXATION.

Necessity that the states should possess independent objects of revenues—The federal constitution only a partial union—Three cases of alienation of state sovereignty—Exclusive legislation by national government—Three instances of such power—Power of taxation a concurrent right—A double tax a question of expediency and not of inability—Concurrent jurisdiction results from the division of the sovereign power.

To the People of the State of New York:

Although I am of opinion that there would be no real danger of the consequences which seem to be apprehended to the State governments from a power in the Union to control them in the levies of money, because I am persuaded that the sense of the people, the extreme hazard of provoking the resentments of the State governments, and a conviction of the utility and necessity of local administrations for local purposes, would be a complete barrier against the oppressive use of such a power; yet I am willing here to allow, in its full extent, the justness of the reasoning which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession, I affirm that (with the sole exception of duties on imports and exports) they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the

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exercise of it would be a violent assumption of power unwarranted by any article or clause of its Constitution.

An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*. I use these terms to distinguish this last case from another which might appear to resemble it, but which would, in fact, be essentially different; I mean where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the *policy* of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority. These three cases of exclusive jurisdiction in the federal government may be exemplified by the following instances: The last clause but one in the eighth section of the first article provides expressly that Congress shall exercise "*exclusive legislation*" over the district to be appropriated as the seat of government. This answers to the first case. The first clause of the same section empowers Congress "*to lay and collect taxes, duties, imposts, and excises*"; and the second clause of the tenth section of the same article declares that "*no State shall*, without the consent of Congress, *lay any imposts or duties on imports or exports*, except for the purpose of executing its inspection laws." Hence would result an exclusive power in the Union to lay duties on imports and exports, with the particular exception mentioned; but this power is abridged by another clause, which declares that no tax or duty shall be laid on articles exported from any State; in consequence of which qualification, it now only extends to the *duties on imports*. This answers to the second case. The third will be found in that clause which declares that Congress shall have power "to establish an UNIFORM RULE of naturalization throughout the United States." This must necessarily be exclusive, because, if each

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State had power to prescribe a DISTINCT RULE, there could not be a UNIFORM RULE.

A case which may perhaps be thought to resemble the latter, but which is in fact widely different, affects the question immediately under consideration. I mean the power of imposing taxes on all articles other than exports and imports. This, I contend, is manifestly a concurrent and coequal authority in the United States and in the individual States. There is plainly no expression in the granting clause which makes that power *exclusive* in the Union. There is no independent clause or sentence which prohibits the States from exercising it. So far is this from being the case that a plain and conclusive argument to the contrary is to be deduced from the restraint laid upon the States in relation to duties on imports and exports. This restriction implies an admission that, if it were not inserted, the States would possess the power it excludes; and it implies a further admission that, as to all other taxes, the authority of the States remains undiminished. In any other view it would be both unnecessary and dangerous; it would be unnecessary, because if the grant to the Union of the power of laying such duties implied the exclusion of the States, or even their subordination in this particular, there could be no need of such a restriction; it would be dangerous, because the introduction of it leads directly to the conclusion which has been mentioned, and which, if the reasoning of the objectors be just, could not have been intended; I mean that the States, in all cases to which the restriction did not apply, would have a concurrent power of taxation with the Union. The restriction in question amounts to what lawyers call a NEGATIVE PREGNANT—that is, a *negation* of one thing, and an *affirmance* of another; a negation of the authority of the States to impose taxes on imports and exports, and an affirmance of their authority to impose them on all other articles. It would be mere sophistry to argue that it was meant to exclude them *absolutely* from the imposition of taxes of the former kind, and to leave them at liberty to lay others *subject to the control* of the national legislature. The restraining or prohibitory clause only says that they shall not, *without the consent of Congress*, lay such duties; and if we are to understand this in the sense last mentioned, the Constitution would then be made to introduce a formal provision for the sake of a very absurd conclusion; which is, that the States, *with the consent* of the national legislature, might tax imports and exports; and that they might tax every other article, *unless controlled* by the same body. If this was the intention, why not leave it in the first instance, to what is alleged to be the

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natural operation of the original clause, conferring a general power of taxation upon the Union? It is evident that this could not have been the intention, and that it will not bear a construction of the kind.

As to a supposition of repugnancy between the power of taxation in the States and in the Union, it cannot be supported in that sense which would be requisite to work an exclusion of the States. It is, indeed, possible that a tax might be laid on a particular article by a State which might render it *inexpedient* that thus a further tax should be laid on the same article by the Union; but it would not imply a constitutional inability to impose a further tax. The quantity of the imposition, the expediency or inexpediency of an increase on either side, would be mutually questions of prudence; but there would be involved no direct contradiction of power. The particular policy of the national and of the State systems of finance might now and then not exactly coincide, and might require reciprocal forbearances. It is not, however, a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of sovereignty.

The necessity of a concurrent jurisdiction in certain cases results from the division of the sovereign power; and the rule that all authorities of which the States are not explicitly divested in favor of the Union remain with them in full vigor, is not a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed Constitution. We there find that, notwithstanding the affirmative grants of general authorities, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the States, to insert negative clauses prohibiting the exercise of them by the States. The tenth section of the first article consists altogether of such provisions. This circumstance is a clear indication of the sense of the convention, and furnishes a rule of interpretation out of the body of the act which justifies the position I have advanced, and refutes every hypothesis to the contrary. PUBLIUS.

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No. 33 [31]. (*Independent Journal*, January 2, 1788.) Hamilton.

TAXATION CONSIDERED WITH RESPECT TO GENERAL POWERS.

The general clauses a source of unnecessary alarm—Definition of power—The sweeping clauses chargeable with tautology, but perfectly harmless—Reason for their introduction—The national government necessarily its own judge in law-making—Supposed cases of invasion of state sovereignty—Nature of laws considered in regard to supreme law—A national law not supreme when a usurpation—The power of the states as to revenue.

To the People of the State of New York:

[The residue of the argument against the provisions of the Constitution in respect to taxation is ingrafted upon the following clause.][1] The last clause of the eighth section of the first article of the plan under consideration authorizes the national legislature "to make all laws which shall be *necessary* and *proper* for carrying into execution *the powers* by that Constitution vested in the government of the United States, or in any department or officer thereof"; and the second clause of the sixth article declares "that the Constitution and the laws of the United States made *in pursuance thereof*, and the treaties made by their authority, shall be the *supreme law* of the land, anything in the constitution or laws of any State to the contrary notwithstanding."

These two clauses have been the source of much virulent invective and petulant declamation against the proposed Constitution. They have been held up to the people in all the exaggerated colors of misrepresentation as the pernicious engines by which their local governments were to be destroyed and their liberties exterminated; as the hideous monster whose devouring jaws would spare neither sex nor age, nor high nor low, nor

[1] In the original newspaper publication this No. XXXIII. was part of the preceding number, but in the collected edition it was divided as above, and the portion of the first paragraph in brackets was added.—EDITOR.

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sacred nor profane; and yet, strange as it may appear after all this clamor, to those who may not have happened to contemplate them in the same light, it may be affirmed with perfect confidence that the constitutional operation of the intended government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every article. They are only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government and vesting it with certain specified powers. This is so clear a proposition that moderation itself can scarcely listen to the railings which have been so copiously vented against this part of the plan, without emotions that disturb its equanimity.

What is a power, but the ability or faculty of doing a thing? What is the ability to do a thing, but the power of employing the *means* necessary to its execution? What is a LEGISLATIVE power, but a power of making LAWS? What are the *means* to execute a LEGISLATIVE power, but LAWS? What is the power of laying and collecting taxes, but a *legislative power*, or a power of *making laws*, to lay and collect taxes? What are the proper means of executing such a power, but *necessary* and *proper* laws?

This simple train of inquiry furnishes us at once with a test by which to judge of the true nature of the clause complained of. It conducts us to this palpable truth, that a power to lay and collect taxes must be a power to pass all laws *necessary* and *proper* for the execution of that power; and what does the unfortunate and calumniated provision in question do more than declare the same truth, to wit, that the national legislature, to whom the power of laying and collecting taxes had been previously given, might in the execution of that power pass all laws *necessary* and *proper* to carry it into effect? I have applied these observations thus particularly to the power of taxation, because it is the immediate subject under consideration, and because it is the most important of the authorities proposed to be conferred upon the Union. But the same process will lead to the same result in re-

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lation to all other powers declared in the Constitution. And it is *expressly* to execute these powers that the sweeping clause, as it has been affectedly called, authorizes the national legislature to pass all *necessary* and *proper* laws. If there is anything exceptionable, it must be sought for in the specific powers upon which this general declaration is predicated. The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless.

But SUSPICION may ask, Why then was it introduced? The answer is that it could only have been done for greater caution, and to guard against all caviling refinements in those who might hereafter feel a disposition to curtail and evade the legitimate authorities of the Union. The convention probably foresaw what it has been a principal aim of these papers to inculcate, that the danger which most threatens our political welfare is that the State governments will finally sap the foundations of the Union; and might therefore think it necessary, in so cardinal a point, to leave nothing to construction. Whatever may have been the inducement to it, the wisdom of the precaution is evident from the cry which has been raised against it; as that very cry betrays a disposition to question the great and essential truth which it is manifestly the object of that provision to declare.

But it may be again asked, Who is to judge of the *necessity* and *propriety* of the laws to be passed for executing the powers of the Union? I answer, first, that this question arises as well and as fully upon the simple grant of those powers as upon the declaratory clause; and I answer, in the second place, that the national government, like every other, must judge, in the first instance, of the proper exercise of its powers, and its constituents in the last. If the federal government should overpass the just bounds of its authority and make a tyrannical use of its powers, the people, whose creature it is, must appeal to the standard they have formed, and take such measures to redress the injury done to the Constitution as the exigency may suggest and prudence justify. The

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propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced constructions of its authority (which, indeed, cannot easily be imagined), the federal legislature should attempt to vary the law of descent in any State, would it not be evident that, in making such an attempt, it had exceeded its jurisdiction, and infringed upon that of the State? Suppose, again, that upon the pretense of an interference with its revenues, it should undertake to abrogate a land-tax imposed by the authority of a State; would it not be equally evident that this was an invasion of that concurrent jurisdiction in respect to this species of tax which its Constitution plainly supposes to exist in the State governments? If there ever should be a doubt on this head, the credit of it will be entirely due to those reasoners who, in the imprudent zeal of their animosity to the plan of the convention, have labored to envelop it in a cloud calculated to obscure the plainest and simplest truths.

But it is said that the laws of the Union are to be the *supreme law* of the land. But what inference can be drawn from this, or what would they amount to, if they were not to be supreme? It is evident they would amount to nothing. A LAW, by the very meaning of the term, includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for POLITICAL POWER AND SUPREMACY. But it will not follow from this doctrine that acts of the larger society which are *not pursuant* to its constitutional powers,

See No. 44.

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but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such. Hence we perceive that the clause which declares the supremacy of the laws of the Union, like the one we have just before considered, only declares a truth which flows immediately and necessarily from the institution of a federal government. It will not, I presume, have escaped observation that it *expressly* confines this supremacy to laws made *pursuant to the Constitution;* which I mention merely as an instance of caution in the convention; since that limitation would have been to be understood, though it had not been expressed.[1]

Though a law, therefore, laying a tax for the use of the United States would be supreme in its nature, and could not legally be opposed or controlled, yet a law for abrogating or preventing the collection of a tax laid by the authority of the State (unless upon imports and exports) would not be the supreme law of the land, but a usurpation of power not granted by the Constitution. As far as an improper accumulation of taxes on the same object might tend to render the collection difficult or precarious, this would be a mutual inconvenience, not arising from a superiority or defect of power on either side, but from an injudicious exercise of power by one or the other, in a manner equally disadvantageous to both. It is to be hoped and presumed, however, that mutual interest would dictate a concert in this respect which would avoid any material inconvenience. The inference from the whole is that the individual States would, under the proposed Constitution, retain an independent and uncontrollable authority to raise revenue to any extent of which they may stand in need, by every kind of taxation, except duties on imports and exports. It will be shown in the next paper that this CONCURRENT JURISDICTION in

[1] See the abridgment of Marshall's opinion in Marbury *vs.* Madison, in Appendix.—EDITOR.

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the article of taxation was the only admissible substitute for an entire subordination, in respect to this branch of power, of the State authority to that of the Union.

PUBLIUS.

No. 34 [32]. (*New York Packet*, January 4, 1788.) Hamilton.

THE CONCURRENT JURISDICTION IN TAXATION OF THE STATES AND NATION.

The states will retain abundant sources of revenue—An example of co-ordinate authority from Roman history—The wants of the states will reduce themselves to very narrow compass—Necessity to provide for more than existing national exigencies of revenue—The nation must be in a position to protect itself—The passions of war reign in the human breast—War expenses of Europe compared with expenses of civil list—Especial illustration in Great Britain—Example of revolutionary debt—Amount needed for expense of states—Possible partition of revenue between states and nation—External and internal taxation—Concurrent taxation the only admissible system.

To the People of the State of New York:

I flatter myself it has been clearly shown in my last number that the particular States, under the proposed Constitution, would have COEQUAL authority with the Union in the article of revenue, except as to duties on imports. As this leaves open to the States far the greatest part of the resources of the community, there can be no color for the assertion that they would not possess means as abundant as could be desired for the supply of their own wants, independent of all external control. That the field is sufficiently wide will more fully appear when we come to advert to the inconsiderable share of the public expenses for which it will fall to the lot of the State governments to provide.

To argue upon abstract principles that this co-ordinate authority cannot exist is to set up supposition and theory against fact and reality. However proper such reason-

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ings might be to show that a thing *ought not to exist*, they are wholly to be rejected when they are made use of to prove that it does not exist, contrary to the evidence of the fact itself. It is well known that in the Roman republic the legislative authority, in the last resort, resided for ages in two different political bodies—not as branches of the same legislature, but as distinct and independent legislatures, in each of which an opposite interest prevailed: in one, the patrician; in the other, the plebeian. Many arguments might have been adduced to prove the unfitness of two such seemingly contradictory authorities, each having power to *annul* or *repeal* the acts of the other. But a man would have been regarded as frantic who should have attempted at Rome to disprove their existence. It will be readily understood that I allude to the COMITIA CENTURIATA and the COMITIA TRIBUTA. The former, in which the people voted by centuries, was so arranged as to give a superiority to the patrician interest; in the latter, in which numbers prevailed, the plebeian interest had an entire predominancy. And yet these two legislatures coexisted for ages, and the Roman republic attained to the utmost height of human greatness.

In the case particularly under consideration there is no such contradiction as appears in the example cited; there is no power on either side to annul the acts of the other. And in practice there is little reason to apprehend any inconvenience; because, in a short course of time, the wants of the States will naturally reduce themselves within *a very narrow compass;* and in the interim the United States will, in all probability, find it convenient to abstain wholly from those objects to which the particular States would be inclined to resort.

To form a more precise judgment of the true merits of this question, it will be well to advert to the proportion between the objects that will require a federal provision in respect to revenue, and those which will require a State provision. We shall discover that the former are altogether unlimited, and that the latter are circumscribed

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within very moderate bounds. In pursuing this inquiry, we must bear in mind that we are not to confine our view to the present period, but to look forward to remote futurity. Constitutions of civil government are not to be framed upon a calculation of existing exigencies, but upon a combination of these with the probable exigencies of ages, according to the natural and tried course of human affairs. Nothing, therefore, can be more fallacious than to infer the extent of any power, proper to be lodged in the national government, from an estimate of its immediate necessities. There ought to be a CAPACITY to provide for future contingencies as they may happen; and as these are illimitable in their nature, it is impossible safely to limit that capacity. It is true, perhaps, that a computation might be made with sufficient accuracy to answer the purpose of the quantity of revenue requisite to discharge the subsisting engagements of the Union and to maintain those establishments which, for some time to come, would suffice in time of peace. But would it be wise, or would it not rather be the extreme of folly, to stop at this point, and to leave the government intrusted with the care of the national defense in a state of absolute incapacity to provide for the protection of the community against future invasions of the public peace, by foreign war or domestic convulsions? If, on the contrary, we ought to exceed this point, where can we stop, short of an indefinite power of providing for emergencies as they may arise? Though it is easy to assert, in general terms, the possibility of forming a rational judgment of a due provision against probable dangers, yet we may safely challenge those who make the assertion to bring forward their data, and may affirm that they would be found as vague and uncertain as any that could be produced to establish the probable duration of the world. Observations confined to the mere prospects of internal attacks can deserve no weight, though even these will admit of no satisfactory calculation; but if we mean to be a commercial people, it must form a part of our policy to be able one day to defend that commerce. The sup-

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port of a navy and of naval wars would involve contingencies that must baffle all the efforts of political arithmetic.

Admitting that we ought to try the novel and absurd experiment in politics of tying up the hands of government from offensive war founded upon reasons of state, yet certainly we ought not to disable it from guarding the community against the ambition or enmity of other nations. A cloud has been for some time hanging over the European world. If it should break forth into a storm, who can insure us that in its progress a part of its fury would not be spent upon us? No reasonable man would hastily pronounce that we are entirely out of its reach. Or if the combustible materials that now seem to be collecting should be dissipated without coming to maturity, or if a flame should be kindled without extending to us, what security can we have that our tranquillity will long remain undisturbed from some other cause or from some other quarter? Let us recollect that peace or war will not always be left to our option; that, however moderate or unambitious we may be, we cannot count upon the moderation, or hope to extinguish the ambition, of others. Who could have imagined at the conclusion of the last war that France and Britain, wearied and exhausted as they both were, would so soon have looked with so hostile an aspect upon each other? To judge from the history of mankind, we shall be compelled to conclude that the fiery and destructive passions of war reign in the human breast with much more powerful sway than the mild and beneficent sentiments of peace; and that to model our political systems upon speculations of lasting tranquillity is to calculate on the weaker springs of the human character.

What are the chief sources of expense in every government? What has occasioned that enormous accumulation of debts with which several of the European nations are oppressed? The answer plainly is, wars and rebellions; the support of those institutions which are necessary to guard the body politic against these two

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most mortal diseases of society. The expenses arising from those institutions which are relative to the mere domestic police of a state, to the support of its legislative, executive, and judicial departments, with their different appendages, and to the encouragement of agriculture and manufactures (which will comprehend almost all the objects of state expenditure), are insignificant in comparison with those which relate to the national defense.[1]

In the kingdom of Great Britain, where all the ostentatious apparatus of monarchy is to be provided for, not above a fifteenth part of the annual income of the nation is appropriated to the class of expenses last mentioned; the other fourteen-fifteenths are absorbed in the payment of the interest of debts contracted for carrying on the wars in which that country has been engaged, and in the maintenance of fleets and armies. If, on the one hand, it should be observed that the expenses incurred in the prosecution of the ambitious enterprises and vainglorious pursuits of a monarchy are not a proper standard by which to judge of those which might be necessary in a republic, it ought, on the other hand, to be remarked that there should be as great a disproportion between the profusion and extravagance of a wealthy kingdom in its domestic administration, and the frugality and economy which in that particular become the modest simplicity of republican government. If we balance a proper deduction from one side against that which it is supposed ought to be made from the other, the proportion may still be considered as holding good.

But let us advert to the large debt which we have ourselves contracted in a single war, and let us only calculate on a common share of the events which disturb the peace of nations, and we shall instantly perceive, without the aid of any elaborate illustration, that there must always be an immense disproportion between the objects of federal and State expenditures. It is true that several of the States, separately, are encumbered with consider-

[1] This was so true in 1788, when this was written, that Jefferson ("Writings," v. 115) seriously argued that nations should be absolutely prohibited from borrowing money. Though military and naval expenses are still the great causes of public debt, yet in the democratization of modern nations there is more and more tendency to employ the public credit for public works and improvement, and this change is especially marked in America.—EDITOR.

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able debts, which are an excrescence of the late war. But this cannot happen again, if the proposed system be adopted;[1] and when these debts are discharged, the only call for revenue of any consequence, which the State governments will continue to experience, will be for the mere support of their respective civil lists; to which, if we add all contingencies, the total amount in every State ought to fall considerably short of two hundred thousand pounds.

In framing a government for posterity as well as ourselves, we ought, in those provisions which are designed to be permanent, to calculate, not on temporary, but on permanent causes of expense.. If this principle be a just one, our attention would be directed to a provision in favor of the State governments for an annual sum of about two hundred thousand pounds; while the exigencies of the Union could be susceptible of no limits, even in imagination. In this view of the subject, by what logic can it be maintained that the local governments ought to command, in perpetuity, an EXCLUSIVE source of revenue for any sum beyond the extent of two hundred thousand pounds? To extend its power further, in *exclusion* of the authority of the Union, would be to take the resources of the community out of those hands which stood in need of them for the public welfare, in order to put them into other hands which could have no just or proper occasion for them.

Suppose, then, the convention had been inclined to proceed upon the principle of a repartition of the objects of revenue between the Union and its members, in *proportion* to their comparative necessities; what particular fund could have been selected for the use of the States that would not either have been too much or too little—

[1] None the less, the national government was in such straits during the war of 1812 that the states of New York and Pennsylvania advanced it nearly a million and a half dollars; and during the Civil War most of the northern states incurred "war debts," that of New York alone being in excess of twenty-seven million dollars. But this latter was so greatly out of proportion to the debts of the other states that recently the larger part was refunded by the national government.—EDITOR.

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too little for their present, too much for their future wants? As to the line of separation between external and internal taxes, this would leave to the States, at a rough computation, the command of two-thirds of the resources of the community to defray from a tenth to a twentieth part of its expenses; and to the Union one-third of the resources of the community to defray from nine-tenths to nineteen-twentieths of its expenses. If we desert this boundary, and content ourselves with leaving to the States an exclusive power of taxing houses and lands, there would still be a great disproportion between the *means* and the *end;* the possession of one-third of the resources of the community to supply, at most, one-tenth of its wants. If any fund could have been selected and appropriated, equal to and not greater than the object, it would have been inadequate to the discharge of the existing debts of the particular States, and would have left them dependent on the Union for a provision for this purpose.

The preceding train of observation will justify the position which has been elsewhere laid down, that "A CONCURRENT JURISDICTION in the article of taxation was the only admissible substitute for an entire subordination, in respect to this branch of power, of State authority to that of the Union." Any separation of the objects of revenue, that could have been fallen upon, would have amounted to a sacrifice of the great INTERESTS of the Union to the POWER of the individual States. The convention thought the concurrent jurisdiction preferable to that subordination; and it is evident that it has at least the merit of reconciling an indefinite constitutional power of taxation in the Federal government with an adequate and independent power in the States to provide for their own necessities. There remain a few other lights, in which this important subject of taxation will claim a further consideration.

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No. 35 [33]. (*Independent Journal*, January 5, 1788.) Hamilton.

ANSWERS TO OBJECTIONS TO INDEFINITE POWERS OF TAXATION.

A limitation of taxation will end in undue burdens on particular objects—A restriction to duties will result in their being carried to an injurious excess—High duties produce smuggling, undue favoring of manufacturing classes, and oppression of the merchant—Payment of duties falls upon both seller and buyer—Consideration of the maxim that the consumer pays the duties—High duties certain to be attended with inequality—An equalization only to be obtained by excises—Special interest of New York—The desire for revenue likely to limit excess in duties—Consideration of the objection that the House of Representatives is too small—Actual representation of all classes purely visionary—Interests of mechanics and manufacturers—Of the learned professions—Of the landed interests—Taxation of land—The representative body will be chiefly composed of landholders—Mutual interest of all classes—Responsiveness of representatives to public opinion—Extensive information needed in the business of taxation—The most productive system of finances is the least burdensome.

To the People of the State of New York:

Before we proceed to examine any other objections to an indefinite power of taxation in the Union, I shall make one general remark; which is that, if the jurisdiction of the national government, in the article of revenue, should be restricted to particular objects, it would naturally occasion an undue proportion of the public burdens to fall upon those objects. Two evils would spring from this source: the oppression of particular branches of industry; and an unequal distribution of the taxes, as well among the several States as among the citizens of the same State.

Suppose, as has been contended for, the federal power of taxation were to be confined to duties on imports, it is evident that the government, for want of being able to command other resources, would frequently be tempted to extend these duties to an injurious excess. There are persons who imagine that they can never be carried to too great a length; since, the higher they are, the more

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it is alleged they will tend to discourage an extravagant consumption, to produce a favorable balance of trade, and to promote domestic manufactures. But all extremes are pernicious in various ways. Exorbitant duties on imported articles would beget a general spirit of smuggling, which is always prejudicial to the fair trader and eventually to the revenue itself; they tend to render other classes of the community tributary, in an improper degree, to the manufacturing classes, to whom they give a premature monopoly of the markets; they sometimes force industry out of its more natural channels into others in which it flows with less advantage; and, in the last place, they oppress the merchant, who is often obliged to pay them himself without any retribution from the consumer. When the demand is equal to the quantity of goods at market, the consumer generally pays the duty; but when the markets happen to be overstocked, a great proportion falls upon the merchant, and sometimes not only exhausts his profits, but breaks in upon his capital. I am apt to think that a division of the duty between the seller and the buyer more often happens than is commonly imagined. It is not always possible to raise the price of a commodity in exact proportion to every additional imposition laid upon it. The merchant, especially in a country of small commercial capital, is often under a necessity of keeping prices down in order to a more expeditious sale.

The maxim that the consumer is the payer is so much oftener true than the reverse of the proposition that it is far more equitable that the duties on imports should go into a common stock than that they should redound to the exclusive benefit of the importing States. But it is not so generally true as to render it equitable that those duties should form the only national fund. When they are paid by the merchant they operate as an additional tax upon the importing State, whose citizens pay their proportion of them in the character of consumers. In this view they are productive of inequality among the States; which inequality would be increased with the

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increased extent of the duties. The confinement of the national revenues to this species of imposts would be attended with inequality, from a different cause, between the manufacturing and the non-manufacturing States. The States which can go furthest toward the supply of their own wants by their own manufactures, will not, according to their numbers or wealth, consume so great a proportion of imported articles as those States which are not in the same favorable situation. They would not, therefore, in this mode alone contribute to the public treasury in a ratio to their abilities. To make them do this it is necessary that recourse be had to excises, the proper objects of which are particular kinds of manufactures. New York is more deeply interested in these considerations than such of her citizens as contend for limiting the power of the Union to external taxation may be aware of. New York is an importing State, and is not likely speedily to be to any great extent[1] a manufacturing State. She would, of course, suffer in a double light from restraining the jurisdiction of the Union to commercial imposts.

So far as these observations tend to inculcate a danger of the import duties being extended to an injurious extreme, it may be observed, conformably to a remark made in another part of these papers, that the interest of the revenue itself would be a sufficient guard against such an extreme. I readily admit that this would be the case as long as other resources were open; but if the avenues to them were closed, HOPE, stimulated by necessity, would beget experiments, fortified by rigorous precautions and additional penalties, which for a time would have the intended effect, till there had been leisure to contrive expedients to elude these new precautions. The first success would be apt to inspire false opinions, which it might require a long course of subsequent experience to correct. Necessity, especially in politics,

See No. 21.

[1] In the text of the edition of 1802, "and from a greater disproportion between her population and territory is unlikely speedily to be, to any great extent."—EDITOR.

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often occasions false hopes, false reasonings, and a system of measures correspondingly erroneous. But even if this supposed excess should not be a consequence of the limitation of the federal power of taxation, the inequalities spoken of would still ensue, though not in the same degree, from the other causes that have been noticed. Let us now return to the examination of objections.

One which, if we may judge from the frequency of its repetition, seems most to be relied on, is that the House of Representatives is not sufficiently numerous for the reception of all the different classes of citizens, in order to combine the interests and feelings of every part of the community and to produce a due sympathy between the representative body and its constituents. This argument presents itself under a very specious and seducing form; and is well calculated to lay hold of the prejudices of those to whom it is addressed. But when we come to dissect it with attention, it will appear to be made up of nothing but fair-sounding words. The object it seems to aim at is, in the first place, impracticable, and in the sense in which it is contended for is unnecessary. I reserve for another place the discussion of the question which relates to the sufficiency of the representative body in respect to numbers, and shall content myself with examining here the particular use which has been made of a contrary supposition in reference to the immediate subject of our inquiries.

See No. 54.

The idea of an actual representation of all classes of the people by persons of each class is altogether visionary. Unless it were expressly provided in the Constitution that each different occupation should send one or more members, the thing would never take place in practice. Mechanics and manufacturers will always be inclined, with few exceptions, to give their votes to merchants in preference to persons of their own professions or trades. Those discerning citizens are well aware that the mechanic and manufacturing arts furnish the materials of mercantile enterprise and industry. Many of them, indeed, are immediately connected with the operations of commerce. They know that the merchant is their natural patron and friend; and they are aware that, however great the confidence they may justly feel in their own good sense, their interests can be more effectually promoted by the merchant than by themselves. They are sensible that their habits in life have not been such as to give them those acquired endowments without which, in a deliberative assembly, the greatest natural abilities are

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for the most part useless; and that the influence and weight and superior acquirements of the merchants render them more equal to a contest with any spirit which might happen to infuse itself into the public councils, unfriendly to the manufacturing and trading interests. These considerations, and many others that might be mentioned, prove, and experience confirms it, that artisans and manufacturers will commonly be disposed to bestow their votes upon merchants and those whom they recommend. We must therefore consider merchants as the natural representatives of all these classes of the community.

With regard to the learned professions little need be observed; they truly form no distinct interest in society, and, according to their situation and talents, will be indiscriminately the objects of the confidence and choice of each other, and of other parts of the community.

Nothing remains but the landed interest; and this, in a political view, and particularly in relation to taxes, I take to be perfectly united, from the wealthiest landlord down to the poorest tenant. No tax can be laid on land which will not affect the proprietor of millions of acres as well as the proprietor of a single acre. Every landholder will therefore have a common interest to keep the taxes on land as low as possible; and common interest may always be reckoned upon as the surest bond of sympathy. But if we even could suppose a distinction of interest between the opulent landholder and the middling farmer, what reason is there to conclude that the first would stand a better chance of being deputed to the national legislature than the last? If we take fact as our guide, and look into our own Senate and Assembly, we shall find that moderate proprietors of land prevail in both; nor is this less the case in the Senate, which consists of a smaller number, than in the Assembly, which is composed of a greater number. Where the qualifications of the electors are the same, whether they have to choose a small or a large number, their votes will fall upon those in whom they have most confidence, whether these happen to be men of large fortunes, or of moderate property, or of no property at all.

It is said to be necessary that all classes of citizens should have some of their own number in the representative body in order that their feelings and interests may be the better understood and attended to. But we have seen that this will never happen under any arrangement that leaves the votes of the people free. Where this is the case, the representative body, with too few exceptions to have any influence on the spirit of the government, will be com-

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posed of landholders, merchants, and men of the learned professions. But where is the danger that the interests and feelings of the different classes of citizens will not be understood or attended to by these three descriptions of men? Will not the landholder know and feel whatever will promote or insure the interest of landed property? And will he not, from his own interest in that species of property, be sufficiently prone to resist every attempt to prejudice or encumber it? Will not the merchant understand and be disposed to cultivate, as far as may be proper, the interests of the mechanic and manufacturing arts, to which his commerce is so nearly allied? Will not the man of the learned profession, who will feel a neutrality to the rivalships between the different branches of industry, be likely to prove an impartial arbiter between them; ready to promote either, so far as it shall appear to him conducive to the general interests of the society?

If we take into the account the momentary humors or dispositions which may happen to prevail in particular parts of the society, and to which a wise administration will never be inattentive, is the man whose situation leads to extensive inquiry and information less likely to be a competent judge of their nature, extent, and foundation than one whose observation does not travel beyond the circle of his neighbors and acquaintances? Is it not natural that a man who is a candidate for the favor of the people, and who is dependent on the suffrages of his fellow-citizens for the continuance of his public honors, should take care to inform himself of their dispositions and inclinations, and should be willing to allow them their proper degree of influence upon his conduct? This dependence, and the necessity of being bound himself, and his posterity, by the laws to which he gives his assent, are the true and they are the strong chords of sympathy between the representative and the constituent.

There is no part of the administration of government that requires extensive information and a thorough knowledge of the principles of political economy so much as the business of taxation. The man who understands those principles best will be least likely to resort to oppressive expedients or to sacrifice any particular class of citizens to the procurement of revenue. It might be demonstrated that the most productive system of finance will always be the least burdensome. There can be no doubt that in order to a judicious exercise of the power of taxation, it is necessary that the person in whose hands it is should be acquainted with the general genius, habits, and modes of thinking of the people at large, and with the resources of the country. And this is all

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that can be reasonably meant by a knowledge of the interests and feelings of the people. In any other sense the proposition has either no meaning or an absurd one. And in that sense let every considerate citizen judge for himself where the requisite qualification is most likely to be found.

PUBLIUS.

No. 36 [34]. (*New York Packet*, January 8, 1788.) Hamilton.

TAXATION CONSIDERED MORE ESPECIALLY AS REGARDS INTERNAL TAXES.

Taxation for the benefit of individuals—Little affinity between various classes of society—Assertion that the nation cannot exercise the power of taxation with advantage—The same power in the state legislatures—Usual method of laying taxes—Internal taxes divided into direct and indirect—Indirect taxes are duties and excises on articles of consumption—In laying these taxes the principal object should be to avoid objects already taxed by particular states—The objections to direct taxes—Method of laying land taxes—The nation can use the method of each state—Direct taxes must be apportioned by population—The abuse of direct taxes provided against with guarded circumspection—Proposition that the nation shall collect all internal taxes by requisition—Impossibility that the revenue laws of nation and states will clash—A small land tax sufficient for the states—Specters raised out of this power of internal taxation—Double sets of tax collectors—Probable employment of state officials—Unlikelihood of double taxation—Poll taxes.

To the People of the State of New York:

We have seen that the result of the observations to which the foregoing number has been principally devoted is that from the natural operation of the different interests and views of the various classes of the community, whether the representation of the people be more or less numerous, it will consist almost entirely of proprietors of land, of merchants, and of members of the learned professions, who will truly represent all those different interests and views. If it should be objected that we have seen other descriptions of men in the local legislatures, I answer that it is admitted there are exceptions to the rule, but not in sufficient number to influence the general complexion or character of the government. There are strong minds in every walk of life that will rise superior to the disadvantages of situation, and

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will command the tribute due to their merit, not only from the classes to which they particularly belong, but from the society in general. The door ought to be equally open to all; and I trust, for the credit of human nature, that we shall see examples of such vigorous plants flourishing in the soil of federal as well as of State legislation; but occasional instances of this sort will not render the reasoning founded upon the general course of things less conclusive.

The subject might be placed in several other lights that would all lead to the same result; and in particular it might be asked, What greater affinity or relation of interest can be conceived between the carpenter and blacksmith, and the linen manufacturer or stocking-weaver, than between the merchant and either of them? It is notorious that there are often as great rivalships between different branches of the mechanic or manufacturing arts as there are between any of the departments of labor and industry; so that, unless the representative body were to be far more numerous than would be consistent with any idea of regularity or wisdom in its deliberations, it is impossible that what seems to be the spirit of the objection we have been considering should ever be realized in practice. But I forbear to dwell any longer on a matter which has hitherto worn too loose a garb to admit even of an accurate inspection of its real shape or tendency.

There is another objection of a somewhat more precise nature that claims our attention. It has been asserted that a power of internal taxation in the national legislature could never be exercised with advantage, as well from the want of a sufficient knowledge of local circumstances, as from an interference between the revenue laws of the Union and of the particular States. The supposition of a want of proper knowledge seems to be entirely destitute of foundation. If any question is depending in a State legislature respecting one of the counties, which demands a knowledge of local details, how is it acquired? No doubt from the information of the members of the county. Cannot the like knowledge be obtained in the national legislature from the representatives of each State? And is it not to be presumed that the men who will generally be sent there will be possessed of the necessary degree of intelligence to be able to communicate that information? Is the knowledge of local circumstances, as

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applied to taxation, a minute topographical acquaintance with all the mountains, rivers, streams, highways, and bypaths in each State; or is it a general acquaintance with its situation and resources; with the state of its agriculture, commerce, manufactures; with the nature of its products and consumptions; with the different degrees and kinds of its wealth, property, and industry?

Nations in general, even under governments of the more popular kind, usually commit the administration of their finances to single men or to boards composed of a few individuals, who digest and prepare in the first instance the plans of taxation which are afterwards passed into laws by the authority of the sovereign or legislature.

Inquisitive and enlightened statesmen are deemed everywhere best qualified to make a judicious selection of the objects proper for revenue; which is a clear indication, as far as the sense of mankind can have weight in the question, of the species of knowledge of local circumstances requisite to the purposes of taxation.

The taxes intended to be comprised under the general denomination of internal taxes may be subdivided into those of the *direct*[1] and those of the *indirect* kind. Though the objection be made to both, yet the reasoning upon it seems to be confined to the former branch. And indeed, as to the latter, by which must be understood duties and excises on articles of consumption, one is at a loss to conceive what can be the nature of the difficulties apprehended. The knowledge relating to them must evidently be of a kind that will either be suggested by the nature of the article itself, or can easily be procured from any well-informed man, espe-

See Nos. 12, 21.

[1] It is interesting to note, in connection with the recent muddle-headedness as to the difference between direct and indirect taxes, that Hamilton, in *The Federalist*, drew the clearest distinction; but later, when the government sought to prove that a tax on carriages was indirect, his brief was the argument which led the court to take that view. Had the Supreme Court laid aside the definitions of "direct" taxes given by the dictionary and by the political economists, it does not seem possible that they could have been long in doubt as to what an income tax was under the constitution; and they would scarcely have come to their first indecision, and to the discreditable reversal which followed so

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cially of the mercantile class. The circumstances that may distinguish its situation in one State from its situation in another must be few, simple, and easy to be comprehended. The principal thing to be attended to would be to avoid those articles which had been previously appropriated to the use of a particular State; and there could be no difficulty in ascertaining the revenue system of each. This could always be known from the respective codes of laws, as well as from the information of the members from the several States.

The objection, when applied to real property or to houses and lands, appears to have, at first sight, more foundation, but even in this view it will not bear a close examination. Land-taxes are commonly laid in one of two modes, either by *actual* valuations, permanent or periodical, or by *occasional* assessments, at the discretion, or according to the best judgment, of certain officers whose duty it is to make them. In either case, the EXECUTION of the business, which alone requires the knowledge of local details, must be devolved upon discreet persons in the character of commissioners or assessors, elected by the people or appointed by the government for the purpose. All that the law can do must be to name the persons or to prescribe the manner of their election or appointment, to fix their numbers and qualifications, and to draw the general outlines of their powers and duties. And what is there in all this that cannot as well be performed by the national legislature as by a State legislature? The attention of either can only reach to general principles; local details, as already observed, must be referred to those who are to execute the plan.

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quickly upon it. As outlined in the introduction, the national compact was a pledge of fair dealing to the minority. The "direct" tax clause was part of this covenant, in accordance with the intention of the framers that any tax which could be levied on classes or sections, or in other words, that any tax which could be used discriminatingly, so as to put burdens on some and not on others, should be apportioned by population, to prevent this very discrimination. Once this is recognized, the whole question is merely "Is the income tax a tax levied by a non-paying majority on the minority?" and its constitutional aspect is obvious.—EDITOR.

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But there is a simple point of view in which this matter may be placed that must be altogether satisfactory. The national legislature can make use of the *system of each State within that State.* The method of laying and collecting this species of taxes in each State can, in all its parts, be adopted and employed by the federal government.

Let it be recollected that the proportion of these taxes is not to be left to the discretion of the national legislature, but is to be determined by the numbers of each State, as described in the second section of the first article. An actual census or enumeration of the people must furnish the rule; a circumstance which effectually shuts the door to partiality or oppression. The abuse of this power of taxation seems to have been provided against with guarded circumspection. In addition to the precaution just mentioned, there is a provision that "all duties, imposts, and excises shall be UNIFORM throughout the United States."

It has been very properly observed, by different speakers and writers on the side of the Constitution, that if the exercise of the power of internal taxation by the Union should be discovered on experiment to be really inconvenient, the federal government may then forbear the use of it and have recourse to requisitions in its stead. By way of answer to this it has been triumphantly asked, Why not in the first instance omit that ambiguous power, and rely upon the latter resource? Two solid answers may be given. The first is that the exercise of that power, if convenient, will be preferable because it will be more effectual; and it is impossible to prove in theory, or otherwise than by the experiment, that it cannot be advantageously exercised. The contrary, indeed, appears most probable. The second answer is that the existence of such a power in the Constitution will have a strong influence in giving efficacy to requisitions. When the States know that the Union can apply itself without their agency, it will be a powerful motive for exertion on their part.

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As to the interference of the revenue laws of the Union and of its members, we have already seen that there can be no clashing or repugnancy of authority. The laws cannot, therefore, in a legal sense, interfere with each other; and it is far from impossible to avoid an interference even in the policy of their different systems. An effectual expedient for this purpose will be, mutually to abstain from those objects which either side may have first had recourse to. As neither can *control* the other, each will have an obvious and sensible interest in this reciprocal forbearance. And where there is an *immediate* common interest, we may safely count upon its operation. When the particular debts of the States are done away, and their expenses come to be limited within their natural compass, the possibility almost of interference will vanish. A small land-tax will answer the purpose of the States, and will be their most simple and most fit resource.

Many specters have been raised out of this power of internal taxation to excite the apprehensions of the people: double sets of revenue officers, a duplication of their burdens by double taxations, and the frightful forms of odious and oppressive poll-taxes, have been played off with all the ingenious dexterity of political legerdemain.

As to the first point, there are two cases in which there can be no room for double sets of officers: one, where the right of imposing the tax is exclusively vested in the Union, which applies to the duties on imports; the other, where the object has not fallen under any State regulation or provision, which may be applicable to a variety of objects. In other cases, the probability is that the United States will either wholly abstain from the objects preoccupied for local purposes, or will make use of the State officers and State regulations for collecting the additional imposition. This will best answer the views of revenue, because it will save expense in the collection, and will best avoid any occasion of disgust to the State governments and to the people. At all events, here is

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a practicable expedient for avoiding such an inconvenience; and nothing more can be required than to show that evils predicted do not necessarily result from the plan.

As to any argument derived from a supposed system of influence, it is a sufficient answer to say that it ought not to be presumed; but the supposition is susceptible of a more precise answer. If such a spirit should infest the councils of the Union, the most certain road to the accomplishment of its aim would be to employ the State officers as much as possible, and to attach them to the Union by an accumulation of their emoluments. This would serve to turn the tide of State influence into the channels of the national government, instead of making federal influence flow in an opposite and adverse current. But all suppositions of this kind are invidious, and ought to be banished from the consideration of the great question before the people. They can answer no other end than to cast a mist over the truth.

As to the suggestion of double taxation, the answer is plain. The wants of the Union are to be supplied in one way or another; if to be done by the authority of the federal government, it will not be to be done by that of the State government. The quantity of taxes to be paid by the community must be the same in either case; with this advantage, if the provision is to be made by the Union—that the capital resource of commercial imposts, which is the most convenient branch of revenue, can be prudently improved to a much greater extent under federal than under State regulation, and, of course, will render it less necessary to recur to more inconvenient methods; and with this further advantage, that as far as there may be any real difficulty in the exercise of the power of internal taxation, it will impose a disposition to greater care in the choice and arrangement of the means; and must naturally tend to make it a fixed point of policy in the national administration to go as far as may be practicable in making the luxury of the rich tributary to the public treasury, in order to diminish the necessity of

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those impositions which might create dissatisfaction in the poorer and most numerous classes of the society. Happy it is when the interest which the government has in the preservation of its own power concides with a proper distribution of the public burdens, and tends to guard the least wealthy part of the community from oppression!

As to poll-taxes,[1] I without scruple confess my disapprobation of them; and though they have prevailed from an early period in those States * which have uniformly been the most tenacious of their rights, I should lament to see them introduced into practice under the national government. But does it follow, because there is a power to lay them, that they will actually be laid? Every State in the Union has power to impose taxes of this kind; and yet in several of them they are unknown in practice. Are the State governments to be stigmatized as tyrannies because they possess this power? If they are not, with what propriety can the like power justify such a charge against the national government, or even be urged as an obstacle to its adoption? As little friendly as I am to the species of imposition, I still feel a thorough conviction that the power of having recourse to it ought to exist in the federal government. There are certain emergencies of nations, in which expedients, that in the ordinary state of things ought to be forborne, become essential to the public weal. And the government, from the possibility of such emergencies, ought ever to have the option of making use of them. The real scarcity of objects in this country, which may be considered as productive sources of revenue, is a reason peculiar to itself for not abridging the discretion of the national councils in this respect. There may exist certain critical and tempestuous conjunctures of the State, in which a poll-tax may become an inestimable resource. And as I know nothing to exempt this portion of the globe from the

* The New England States.—PUBLIUS.

[1] See article on Poll tax, by W. C. Ford, in Lalor's "Cyclopædia of Political Science."—EDITOR.

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common calamities that have befallen other parts of it, I acknowledge my aversion to every project that is calculated to disarm the government of a single weapon which, in any possible contingency, might be usefully employed for the general defense and security.

I have now gone through the examination of such of the powers proposed to be vested in the United States which may be considered as having an immediate relation to the energy of the government; and have endeavored to answer the principal objections which have been made to them. I have passed over in silence those minor authorities which are either too inconsiderable to have been thought worthy of the hostilities of the opponents of the Constitution, or of too manifest propriety to admit of controversy. The mass of judiciary power, however, might have claimed an investigation under this head, had it not been for the consideration that its organization and its extent may be more advantageously considered in connection. This has determined me to refer it to the branch of our inquiries upon which we shall next enter.

PUBLIUS.

No. 37 [36]. (*Daily Advertiser*, January 11, 1788.) Madison.

DIFFICULTIES OF THE CONVENTION IN FRAMING A CONSTITUTION.

Difficulty of discussing public measures in the right spirit—Predetermined friends and enemies—The Federalist addressed to neither, but to those who wish merely the happiness of the country—Novelty and difficulties of the work pointed out—The constitution of necessity not perfect, but the convention worked without party feeling, and all were finally satisfied.

To the People of the State of New York:

In reviewing the defects of the existing Confederation, and showing that they cannot be supplied by a government of less energy than that before the public, several of the most important principles of the latter fell of course

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under consideration. But as the ultimate object of these papers is to determine clearly and fully the merits of this Constitution, and the expediency of adopting it, our plan cannot be complete without taking a more critical and thorough survey of the work of the convention; without examining it on all its sides, comparing it in all its parts, and calculating its probable effects.

That this remaining task may be executed under impressions conducive to a just and fair result, some reflections must in this place be indulged, which candor previously suggests.

It is a misfortune inseparable from human affairs that public measures are rarely investigated with that spirit of moderation which is essential to a just estimate of their real tendency to advance or obstruct the public good; and that this spirit is more apt to be diminished than promoted by those occasions which require an unusual exercise of it. To those who have been led by experience to attend to this consideration, it could not appear surprising that the act of the convention, which recommends so many important changes and innovations, which may be viewed in so many lights and relations, and which touches the springs of so many passions and interests, should find or excite dispositions unfriendly, both on one side and on the other, to a fair discussion and accurate judgment of its merits. In some it has been too evident, from their own publications, that they have scanned the proposed Constitution, not only with a predisposition to censure, but with a predetermination to condemn; as the language held by others betrays an opposite predetermination or bias, which must render their opinions also of little moment in the question. In placing, however, these different characters on a level, with respect to the weight of their opinions, I wish not to insinuate that there may not be a material difference in the purity of their intentions. It is but just to remark, in favor of the latter description, that as our situation is universally admitted to be peculiarly critical, and to require indispensably that something should be done for our relief, the predetermined patron of what has been actually done may have taken his bias from the weight of these considerations, as well as from considerations of a sinister nature. The predetermined adversary, on the other hand, can have been governed by no venial motive whatever. The intentions of the first may be upright, as they may, on the contrary, be culpable. The views of the last cannot be upright, and must be culpable. But the truth is that these papers are not addressed to persons falling under

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either of these characters. They solicit the attention of those only who add to a sincere zeal for the happiness of their country a temper favorable to a just estimate of the means of promoting it.

Persons of this character will proceed to an examination of the plan submitted by the convention, not only without a disposition to find or to magnify faults, but will see the propriety of reflecting that a faultless plan was not to be expected. Nor will they barely make allowances for the errors which may be chargeable on the fallibility to which the convention, as a body of men, were liable; but will keep in mind that they themselves also are but men and ought not to assume an infallibility in rejudging the fallible opinions of others.

With equal readiness will it be perceived that, besides these inducements to candor, many allowances ought to be made for the difficulties inherent in the very nature of the undertaking referred to the convention.

The novelty of the undertaking immediately strikes us. It has been shown in the course of these papers that the existing Confederation is founded on principles which are fallacious; that we must consequently change this first foundation, and with it the superstructure resting upon it. It has been shown that the other confederacies which could be consulted as precedents have been vitiated by the same erroneous principles, and can therefore furnish no other light than that of beacons, which give warning of the course to be shunned without pointing out that which ought to be pursued. The most that the convention could do in such a situation was to avoid the errors suggested by the past experience of other countries, as well as of our own; and to provide a convenient mode of rectifying their own errors, as future experience may unfold them.

Among the difficulties encountered by the convention a very important one must have lain in combining the requisite stability and energy in government with the inviolable attention due to liberty and to the republican form. Without substantially accomplishing this part of their undertaking, they would have very imperfectly fulfilled the object of their appointment or the expectation of the public; yet that it could not be easily accomplished will be denied by no one who is unwilling to betray his ignorance of the subject. Energy in government is essential to that security against external and internal danger, and to that prompt and salutary execu-

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tion of the laws which enter into the very definition of good government. Stability in government is essential to national character and to the advantages annexed to it, as well as to that repose and confidence in the minds of the people, which are among the chief blessings of civil society. An irregular and mutable legislation is not more an evil in itself than it is odious to the people; and it may be pronounced with assurance that the people of this country, enlightened as they are with regard to the nature, and interested, as the great body of them are, in the effects of good government, will never be satisfied till some remedy be applied to the vicissitudes and uncertainties which characterize the State administrations. On comparing, however, these valuable ingredients with the vital principles of liberty, we must perceive at once the difficulty of mingling them together in their due proportions. The genius of republican liberty seems to demand on one side, not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people, by a short duration of their appointments; and that, even during this short period, the trust should be placed not in a few but a number of hands. Stability, on the contrary, requires that the hands in which power is lodged should continue for a length of time the same.[1]

[1] Bagehot ("The English Constitution," 74) argues that the stability involved in a fixed term of office is a great defect in the United States government, as compared with that of Great Britain, where the ministry can be turned out at any moment, and a new Parliament obtained. As a matter of fact, the two systems are not so far apart in practice as they are in principle, for the American representative, by being far more responsive to public opinion, can, in any critical moment, be relied upon to accord with, or at least not to oppose, the strongly expressed will of his constituents. But even granting that the American, through his fixed term, is more independent of the voter than his English *confrère*, a corresponding gain is his greater independence in other respects. It is well known that the ministry in England can "whip" members of their own party into supporting distasteful measures by the threat of putting these members to the expense and risk of a general election. More striking still is the fact that the ministry so dread this possibility of being voted out of office that they constantly yield points against their own convictions, to the extent even of outbidding the measures of the opposing party, as for instance when the chief extensions of the franchise

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A frequent change of men will result from a frequent return of elections, and a frequent change of measures from a frequent change of men; whilst energy in government requires not only a certain duration of power, but the execution of it by a single hand.

How far the convention may have succeeded in this part of their work, will better appear on a more accurate view of it. From the cursory view here taken, it must clearly appear to have been an arduous part.

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in Great Britain were passed by the Conservative party, not because it approved them, but because this seemed the only way of retaining office. From this form of political double-dealing American parties have been very free; and, while "trimming" platforms is a frequent device, no party has ever been able to win office by stultifying its true opinion. In the few cases in which parties have tried to reverse their policy, their prompt extinction as important factors has always resulted.

Aside from this question of prompt response to new opinions and conditions, there can be no doubt that the two systems are not widely divergent, since the average length of a Parliament has been shown to be four years, which implies that the British voter and his American brother attain very much the same results by different methods. But here a curious divergence, which deserves recognition, reveals itself. Parliamentary control, since 1815, has been described as a see-saw, a new party taking the reins after nearly every general election. But in the United States parties have held the presidency continuously for periods of twenty-four, twenty, eighteen, and twelve years, or in other words, during three-quarters of our national history we have had but three changes of control. The reason for this rests in this very term of office, which has at once its advantages and disadvantages. In Great Britain, when a ministry is voted out of office on a single measure, the issue can never be in doubt, and thus an English general election is in the majority of cases fought on a single question. In the United States, however, a national election usually involves the important issues of the preceding four years, and the result must inevitably be a less decisive indication of the public mind. In the one case, the system amounts almost to a referendum on a particular bill. In the other, it forces not an expression on any single measure, but on the general policy of a party. The voter in Great Britain, to express his disapproval of a measure, very often votes for men to whose general policy he is opposed; the voter in America swallows what he dislikes and keeps his party in office. The short period of office-holding in England and the long period in America are the logical results. When the issue is presented clean-cut, and in the moment of greatest excitement, the elector votes against the measure and necessarily against his party. When the issues are many, and the first heat over such as are disliked has had time to cool, the elector continues faithful to his party. It would be difficult to say which system best fulfills the will of the elector. If the experience of France is a fair one to cite, it is evident that the power to vote ministries out of office leads to hopeless instability, unless that power is balanced by a stability in the representative body or in the elector.—EDITOR.

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Not less arduous must have been the task of marking the proper line of partition between the authority of the general and that of the State governments. Every man will be sensible of this difficulty, in proportion as he has been accustomed to contemplate and discriminate objects extensive and complicated in their nature. The faculties of the mind itself have never yet been distinguished and defined, with satisfactory precision, by all the efforts of the most acute and metaphysical philosophers. Sense, perception, judgment, desire, volition, memory, imagination, are found to be separated by such delicate shades and minute gradations that their boundaries have eluded the most subtle investigations, and remain a pregnant source of ingenious disquisition and controversy. The boundaries between the great kingdom of nature, and, still more, between the various provinces and lesser portions into which they are subdivided, afford another illustration of the same important truth. The most sagacious and laborious naturalists have never yet succeeded in tracing with certainty the line which separates the district of vegetable life from the neighboring region of unorganized matter, or which marks the termination of the former and the commencement of the animal empire. A still greater obscurity lies in the distinctive characters by which the objects in each of these great departments of nature have been arranged and assorted.

See No. 45.

When we pass from the works of nature, in which all the delineations are perfectly accurate, and appear to be otherwise only from the imperfection of the eye which surveys them, to the institutions of man, in which the obscurity arises as well from the object itself as from the organ by which it is contemplated, we must perceive the necessity of moderating still further our expectations and hopes from the efforts of human sagacity. Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary; or even the privileges and

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powers of the different legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.

The experience of ages, with the continued and combined labors of the most enlightened legislators and jurists, has been equally unsuccessful in delineating the several objects and limits of different codes of laws and different tribunals of justice. The precise extent of the common law, and the statute law, the maritime law, the ecclesiastical law, the law of corporations, and other local laws and customs, remains still to be clearly and finally established in Great Britain, where accuracy in such subjects has been more industriously pursued than in any other part of the world. The jurisdiction of her several courts, general and local, of law, of equity, of admiralty, etc., is not less a source of frequent and intricate discussions, sufficiently denoting the indeterminate limits by which they are respectively circumscribed. All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications. Besides the obscurity arising from the complexity of objects, and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment. The use of words is to express ideas. Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many, equivocally denoting different ideas. Hence it must happen that, however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which

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it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.

Here, then, are three sources of vague and incorrect definitions: indistinctness of the object, imperfection of the organ of conception, inadequateness of the vehicle of ideas. Any one of these must produce a certain degree of obscurity. The convention, in delineating the boundary between the federal and State jurisdictions, must have experienced the full effect of them all.

To the difficulties already mentioned may be added the interfering pretensions of the larger and smaller States. We cannot err in supposing that the former would contend for a participation in the government fully proportioned to their superior wealth and importance; and that the latter would not be less tenacious of the equality at present enjoyed by them.[1] We may well suppose that neither side would entirely yield to the other, and consequently that the struggle could be terminated only by compromise. It is extremely prob-

See No. 62.

[1] This equality of the states constituted the most difficult problem of their union. In the Congress of 1774 it was the first question raised, and though the larger colonies finally conceded that the provinces should be equal in voting, it was with a distinct entry on the journal that a precedent should not thereby be established. The question was again warmly contested in the discussions of the articles of confederation, and once more the small states were successful in carrying their point, though, to neutralize somewhat the possibility of one-third of the people legislating for the whole country, it was stipulated that all resolutions must receive the votes of nine states; an inhibition which had its penalty for as well as advantage to the large states, for by their larger delegations they were more constantly represented in the Congress. Jefferson seems first to have hit upon the expedient finally accepted, when he suggested in 1776 that a system should be adopted by which "any proposition might be negatived by the representatives of a majority of the people of America, or of a majority of the colonies of America. The former secures the larger, the latter the smaller colonies." It was on this idea, by means of various propositions of Randolph, Dickinson, Johnson, and Gerry in the federal convention, that the people and the states were severally represented in the upper and lower houses of Congress.—EDITOR.

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able, also, that after the ratio of representation had been adjusted, this very compromise must have produced a fresh struggle between the same parties, to give such a turn to the organization of the government, and to the distribution of its powers, as would increase the importance of the branches, in forming which they had respectively obtained the greatest share of influence. There are features in the Constitution which warrant each of these suppositions; and as far as either of them is well founded, it shows that the convention must have been compelled to sacrifice theoretical propriety to the force of extraneous considerations.

Nor could it have been the large and small States only, which would marshal themselves in opposition to each other on various points. Other combinations, resulting from a difference of local position and policy, must have created additional difficulties. As every State may be divided into different districts, and its citizens into different classes, which give birth to contending interests and local jealousies, so the different parts of the United States are distinguished from each other by a variety of circumstances, which produce a like effect on a larger scale. And although this variety of interests, for reasons sufficiently explained in a former paper, may have a salutary influence on the administration of the government when formed, yet everyone must be sensible of the contrary influence, which must have been experienced in the task of forming it.

Would it be wonderful if, under the pressure of all these difficulties, the convention should have been forced into some deviations from that artificial structure and regular symmetry which an abstract view of the subject might lead an ingenious theorist to bestow on a Constitution planned in his closet or in his imagination? The real wonder is that so many difficulties should have been surmounted, and surmounted with a unanimity almost as unprecedented as it must have been unexpected. It is impossible for any man of candor to reflect on this circumstance without partaking of the astonishment. It is

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impossible for the man of pious reflection not to perceive in it a finger of that Almighty hand which has been so frequently and signally extended to our relief in the critical stages of the revolution.

We had occasion, in a former paper, to take notice of the repeated trials which have been unsuccessfully made in the United Netherlands for reforming the baneful and notorious vices of their constitution. The history of almost all the great councils and consultations held among mankind for reconciling their discordant opinions, assuaging their mutual jealousies, and adjusting their respective interests, is a history of factions, contentions, and disappointments, and may be classed among the most dark and degraded pictures which display the infirmities and depravities of the human character. If, in a few scattered instances, a brighter aspect is presented, they serve only as exceptions to admonish us of the general truth, and by their luster to darken the gloom of the adverse prospect to which they are contrasted. In revolving the causes from which these exceptions result, and applying them to the particular instances before us, we are necessarily led to two important conclusions. The first is that the convention must have enjoyed, in a very singular degree, an exemption from the pestilential influence of party animosities—the disease most incident to deliberative bodies, and most apt to contaminate their proceedings. The second conclusion is that all the deputations composing the convention were satisfactorily accommodated by the final act, or were induced to accede to it by a deep conviction of the necessity of sacrificing private opinions and partial interests to the public good, and by a despair of seeing this necessity diminished by delays or by new experiments.

PUBLIUS.

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No. 38 [37]. (*Independent Journal*, January 12, 1788.) Madison.

INCOHERENCE OF THE OBJECTIONS TO THE CONSTITUTION.

All governments of deliberation and consent hitherto framed by individuals—Examples—Errors in the new system arise from lack of experience—The present situation of America—Existing evils shown, and the futility of the objections and remedies of the opposition.

To the People of the State of New York:

It is not a little remarkable that in every case reported by ancient history, in which government has been established with deliberation and consent, the task of framing it has not been committed to an assembly of men, but has been performed by some individual citizen of pre-eminent wisdom and approved integrity.

Minos, we learn, was the primitive founder of the government of Crete, as Zaleucus was of that of the Locrians. Theseus first, and after him Draco and Solon, instituted the government of Athens. Lycurgus was the lawgiver of Sparta. The foundation of the original government of Rome was laid by Romulus, and the work completed by two of his elective successors, Numa and Tullius Hostilius. On the abolition of royalty the consular administration was substituted by Brutus, who stepped forward with a project for such a reform, which, he alleged, had been prepared by Tullius Hostilius, and to which his address obtained the assent and ratification of the senate and people. This remark is applicable to confederate governments also. Amphictyon, we are told, was the author of that which bore his name. The Achæan league received its first birth from Achæus, and its second from Aratus.

What degree of agency these reputed lawgivers might have in their respective establishments, or how far they might be clothed with the legitimate authority of the people, cannot in every instance be ascertained. In some, however, the proceeding was strictly regular. Draco appears to have been intrusted by the people of Athens with indefinite powers to reform its government and laws. And Solon, according to Plutarch, was in a manner compelled, by the universal suffrage of his fellow-citizens, to take upon him the sole and absolute power of new-modeling the constitution. The proceedings under Lycurgus were less regular; but as far as the advocates for a regular reform could prevail, they all turned their eyes toward the single efforts of that celebrated patriot and

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sage, instead of seeking to bring about a revolution by the intervention of a deliberative body of citizens.

Whence could it have proceeded that a people, jealous as the Greeks were of their liberty, should so far abandon the rules of caution as to place their destiny in the hands of a single citizen? Whence could it have proceeded that the Athenians, a people who would not suffer an army to be commanded by fewer than ten generals, and who required no other proof of danger to their liberties than the illustrious merit of a fellow-citizen, should consider one illustrious citizen as a more eligible depositary of the fortunes of themselves and their posterity than a select body of citizens, from whose common deliberations more wisdom, as well as more safety, might have been expected? These questions cannot be fully answered without supposing that the fears of discord and disunion among a number of counselors exceeded the apprehension of treachery or incapacity in a single individual. History informs us, likewise, of the difficulties with which these celebrated reformers had to contend, as well as the expedients which they were obliged to employ in order to carry their reforms into effect. Solon, who seems to have indulged a more temporizing policy, confessed that he had not given to his countrymen the government best suited to their happiness but most tolerable to their prejudices. And Lycurgus, more true to his object, was under the necessity of mixing a portion of violence with the authority of superstition, and of securing his final success by a voluntary renunciation, first of his country, and then of his life. If these lessons teach us, on one hand, to admire the improvement made by America on the ancient mode of preparing and establishing regular plans of government, they serve not less, on the other, to admonish us of the hazards and difficulties incident to such experiments and of the great imprudence of unnecessarily multiplying them.

Is it an unreasonable conjecture that the errors which may be contained in the plan of the convention are such as have resulted rather from the defect of antecedent experience on this complicated and difficult subject than from a want of accuracy or care in the investigation of it; and, consequently, such as will not be ascertained until an actual trial shall have pointed them out? This conjecture is rendered probable, not only by many considerations of a general nature, but by the particular case of the Articles of Confederation. It is observable that among the numerous objections and amendments suggested by the several States, when these articles were submitted for their ratification, not one is found which alludes to the great and radical error which on actual trial

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has discovered itself. And if we except the observations which New Jersey[1] was led to make, rather by her local situation than by her peculiar foresight, it may be questioned whether a single suggestion was of sufficient moment to justify a revision of the system. There is abundant reason, nevertheless, to suppose that, immaterial as these objections were, they would have been adhered to with a very dangerous inflexibility in some States, had not a zeal for their opinions and supposed interests been stifled by the more powerful sentiment of self-preservation. One State,[2] we may remember, persisted for several years in refusing her concurrence, although the enemy remained the whole period at our gates, or rather in the very bowels of our country. Nor was her pliancy in the end effected by a less motive than the fear of being chargeable with protracting the public calamities and endangering the event of the contest. Every candid reader will make the proper reflections on these important facts.

A patient who finds his disorder daily growing worse, and that an efficacious remedy can no longer be delayed without extreme danger, after coolly revolving his situation and the characters of different physicians, selects and calls in such of them as he judges most capable of administering relief and best entitled to his confidence. The physicians attend; the case of the patient is carefully examined; a consultation is held; they are unanimously agreed that the symptoms are critical, but that the case, with proper and timely relief, is so far from being desperate that it may be made to issue in an improvement of his constitution. They are equally unanimous in prescribing the remedy by which this happy effect is to be produced. The prescription is no sooner made known, however, than a number of persons interpose, and, without denying the reality or danger of the disorder, assure the patient that the prescription will be poison to his constitution, and forbid him, under pain of certain death, to make use of it. Might not the patient reasonably demand, before he ventured to follow this advice, that the authors of it should at least agree among themselves on some other remedy to be substituted? And if he found them differing as much from one another as from his first counselors,

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[1] New Jersey had insisted that control of commerce was a national affair, and that it should, with its resulting powers of taxation, be vested in the Congress of the Confederation. See "Secret Journals of Congress," i. 359. The motive for this demand is given at p. 37, *infra*.—EDITOR.

[2] Maryland, for reasons recorded in the "Secret Journals of Congress," i. 417.—EDITOR.

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would he not act prudently in trying the experiment unanimously recommended by the latter, rather than be hearkening to those who could neither deny the necessity of a speedy remedy nor agree in proposing one?

Such a patient and in such a situation is America at this moment. She has been sensible of her malady. She has obtained a regular and unanimous advice from men of her own deliberate choice. And she is warned by others against following this advice under pain of the most fatal consequences. Do the monitors deny the reality of her danger? No. Do they deny the necessity of some speedy and powerful remedy? No. Are they agreed, are any two of them agreed, in their objections to the remedy proposed, or in the proper one to be substituted? Let them speak for themselves. This one tells us that the proposed Constitution ought to be rejected, because it is not a confederation of the States but a government over individuals. Another admits that it ought to be a government over individuals to a certain extent, but by no means to the extent proposed. A third does not object to the government over individuals, or to the extent proposed, but to the want of a bill of rights. A fourth concurs in the absolute necessity of a bill of rights, but contends that it ought to be declaratory, not of the personal rights of individuals, but of the rights reserved to the States in their political capacity. A fifth is of opinion that a bill of rights of any sort would be superfluous and misplaced, and that the plan would be unexceptionable but for the fatal power of regulating the times and places of election. An objector in a large State exclaims loudly against the unreasonable equality of representation in the Senate. An objector in a small State is equally loud against the dangerous inequality in the House of Representatives. From this quarter, we are alarmed with the amazing expense from the number of persons who are to administer the new government. From another quarter, and sometimes from the same quarter, on another occasion, the cry is that the Congress will be but a shadow of a representation, and that the government would be far less objectionable if the number and the expense were doubled. A patriot in a State that does not import or export discerns insuperable objections against the power of direct taxation. The patriotic adversary in a State of great exports and imports is not less dissatisfied that the whole burden of taxes may be thrown on consumption. This politician discovers in the Constitution a direct and irresistible tendency to monarchy; that is equally sure it will end in aristocracy. Another is puzzled to say which of these shapes it will ultimately assume, but sees clearly it

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must be one or other of them; whilst a fourth is not wanting, who with no less confidence affirms that the Constitution is so far from having a bias toward either of these dangers that the weight on that side will not be sufficient to keep it upright and firm against its opposite propensities. With another class of adversaries to the Constitution the language is that the legislative, executive, and judiciary departments are intermixed in such a manner as to contradict all the ideas of regular government and all the requisite precautions in favor of liberty. Whilst this objection circulates in vague and general expressions, there are but a few who lend their sanction to it. Let each one come forward with his particular explanation, and scarce any two are exactly agreed upon the subject. In the eyes of one the junction of the Senate with the President in the responsible function of appointing to offices, instead of vesting this executive power in the Executive alone, is the vicious part of the organization. To another, the exclusion of the House of Representatives, whose numbers alone could be a due security against corruption and partiality in the exercise of such a power, is equally obnoxious. With another, the admission of the President into any share of a power which must ever be a dangerous engine in the hands of the executive magistrate is an unpardonable violation of the maxims of republican jealousy. No part of the arrangement, according to some, is more inadmissible than the trial of impeachments by the Senate, which is alternately a member both of the legislative and executive departments, when this power so evidently belonged to the judiciary department. "We concur fully," reply others, "in the objection to this part of the plan, but we can never agree that a reference of impeachments to the judiciary authority would be an amendment of the error. Our principal dislike to the organization arises from the extensive powers already lodged in that department." Even among the zealous patrons of a council of state the most irreconcilable variance is discovered concerning the mode in which it ought to be constituted. The demand of one gentleman is that the council should consist of a small number, to be appointed by the most numerous branch of the legislature. Another would prefer a larger number, and considers it as a fundamental condition that the appointment should be made by the President himself.

As it can give no umbrage to the writers against the plan of the federal Constitution, let us suppose that, as they are the most zealous, so they are also the most sagacious, of those who think the late convention were unequal to the task assigned them, and that a wiser and better plan might and ought to be substituted.

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Let us further suppose that their country should concur, both in this favorable opinion of their merits, and in their unfavorable opinion of the convention; and should accordingly proceed to form them into a second convention, with full powers, and for the express purpose of revising and remolding the work of the first. Were the experiment to be seriously made, though it required some effort to view it seriously even in fiction, I leave it to be decided by the sample of opinions just exhibited, whether, with all their enmity to their predecessors, they would, in any one point, depart so widely from their example as in the discord and ferment that would mark their own deliberations; and whether the Constitution now before the public would not stand as fair a chance for immortality as Lycurgus gave to that of Sparta, by making its change to depend on his own return from exile and death, if it were to be immediately adopted, and were to continue in force, not until a BETTER, but until ANOTHER should be agreed upon by this new assembly of lawgivers.

It is a matter both of wonder and regret that those who raise so many objections against the new Constitution should never call to mind the defects of that which is to be exchanged for it. It is not necessary that the former should be perfect: it is sufficient that the latter is more imperfect. No man would refuse to give brass for silver or gold, because the latter had some alloy in it. No man would refuse to quit a shattered and tottering habitation for a firm and commodious building, because the latter had not a porch to it, or because some of the rooms might be a little larger or smaller, or the ceiling a little higher or lower, than his fancy would have planned them. But waiving illustrations of this sort, is it not manifest that most of the capital objections urged against the new system lie with tenfold weight against the existing Confederation? Is an indefinite power to raise money dangerous in the hands of the federal government? The present Congress can make requisitions to any amount they please, and the States are constitutionally bound to furnish them; they can emit bills of credit as long as they will pay for the paper; they can borrow, both abroad and at home, as long as a shilling will be lent. Is an indefinite power to raise troops dangerous? The Confederation gives to Congress that power also; and

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they have already begun to make use of it. Is it im proper and unsafe to intermix the different powers o government in the same body of men? Congress, a singl body of men, are the sole depositary of all the feder powers. Is it particularly dangerous to give the keys o the treasury, and the command of the army, into th same hands? The Confederation places them both i the hands of Congress. Is a bill of rights essential t liberty? The Confederation has no bill of rights. Is an objection against the new Constitution that it em powers the Senate, with the concurrence of the Execu tive, to make treaties which are to be the laws of th land? The existing Congress, without any such contro can make treaties which they themselves have declared and most of the States have recognized, to be the suprem law of the land. Is the importation of slaves permitte by the new Constitution for twenty years? By the old it is permitted forever.

I shall be told that, however dangerous this mixture o powers may be in theory, it is rendered harmless by th dependence of Congress on the States for the means o carrying them into practice; that, however large the mas of powers may be, it is in fact a lifeless mass. Then, sa I, in the first place, that the Confederation is chargeabl with the still greater folly of declaring certain powers i the federal government to be absolutely necessary an at the same time rendering them absolutely nugatory and, in the next place, that if the Union is to continue and no better government be substituted, effectiv powers must either be granted to, or assumed by, the existing Congress; in either of which events, the contrast just stated will hold good. But this is not all. Out of this lifeless mass has already grown an excrescent power, which tends to realize all the dangers that can be apprehended from a defective construction of the supreme government of the Union. It is now no longer a point of speculation and hope that the Western territory is a mine of vast wealth to the United States; and although it is not of such a nature as to extricate them from their

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esent distresses, or, for some time to come, to yield
ny regular supplies for the public expenses, yet must it
hereafter be able, under proper management,
No. 7. both to effect a gradual discharge of the do-
estic debt, and to furnish, for a certain period, liberal
butes to the federal treasury. A very large proportion
this fund has been already surrendered by individual
ates; and it may with reason be expected that the
maining States will not persist in withholding similar
oofs of their equity and generosity. We may calculate,
erefore, that a rich and fertile country, of an area equal
the inhabited extent of the United States, will soon
come a national stock. Congress have assumed the
ministration of this stock. They have begun to render
productive. Congress have undertaken to do more:
ey have proceeded to form new States, to erect tem-
rary governments, to appoint officers for them, and to
rescribe the conditions on which such States shall be
mitted into the Confederacy. All this has been done;
id done without the least color of constitutional
uthority. Yet no blame has been whispered; no alarm
s been sounded. A GREAT and INDEPENDENT fund of
venue is passing into the hands of a SINGLE BODY of men,
ho can RAISE TROOPS to an INDEFINITE NUMBER, and
propriate money to their support for an INDEFINITE
RIOD OF TIME. And yet there are men who have not only
en silent spectators of this prospect but who are advo-
ates for the system which exhibits it; and, at the same
me, urge against the new system the objections which we
ave heard. Would they not act with more consistency
urging the establishment of the latter, as no less nec-
ssary to guard the Union against the future powers and
esources of a body constructed like the existing Con-
gress than to save it from the dangers threatened by the
resent impotency of that Assembly?

I mean not, by anything here said, to throw censure
on the measures which have been pursued by Congress.
I am sensible they could not have done otherwise. The
ublic interest, the necessity of the case, imposed upon

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them the task of overleaping their constitutional limits. But is not the fact an alarming proof of the danger resulting from a government which does not possess regular powers commensurate to its objects? A dissolution or usurpation is the dreadful dilemma to which it is continually exposed.

PUBLIUS.

No. 39 [38]. (*Independent Journal*, January 16, 1788.) Madison.

THE CONSTITUTION STRICTLY REPUBLICAN.

Only a republican system possible for America—The principle of republican government shown by examples—The proposed constitution conforms to the standard—Proofs of this from the provisions of the constitution—Neither wholly national nor wholly federal.

To the People of the State of New York:

The last paper having concluded the observations which were meant to introduce a candid survey of the plan of government reported by the convention, we now proceed to the execution of that part of our undertaking.

The first question that offers itself is whether the general form and aspect of the government be strictly republican. It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom to rest all our political experiments on the capacity of mankind for self-government. If the plan of the convention, therefore, be found to depart from the republican character, its advocates must abandon it as no longer defensible.

What, then, are the distinctive characters of the republican form? Were an answer to this question to be sought, not by recurring to principles, but in the application of the term by political writers to the constitutions of different States, no satisfactory one would ever be found.

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Holland, in which no particle of the supreme authority is derived from the people, has passed almost universally under the denomination of a republic. The same title has been bestowed on Venice, where absolute power over the great body of the people is exercised, in the most absolute manner, by a small body of hereditary nobles. Poland, which is a mixture of aristocracy and of monarchy in their worst forms, has been dignified with the same appellation. The government of England, which has one republican branch only, combined with an hereditary aristocracy and monarchy, has, with equal impropriety, been frequently placed on the list of republics. These examples, which are nearly as dissimilar to each other as to a genuine republic, show the extreme inaccuracy with which the term has been used in political disquisitions.

If we resort for a criterion to the different principles on which different forms of government are established, we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans and claim for their government the honorable title of republic. It is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified; otherwise every government in the United States, as well as every other popular government that has been or can be well organized or well executed, would be degraded from the republican character. According to the constitution of every State in the Union, some or other of the officers of government are

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appointed indirectly only by the people. According to most of them, the chief magistrate himself is so appointed. And according to one, this mode of appointment is extended to one of the co-ordinate branches of the legislature. According to all the constitutions, also, the tenure of the highest offices is extended to a definite period, and in many instances, both within the legislative and executive departments, to a period of years. According to the provisions of most of the constitutions, again, as well as according to the most respectable and received opinions on the subject, the members of the judiciary department are to retain their offices by the firm tenure of good behavior.

On comparing the Constitution planned by the convention with the standard here fixed, we perceive at once that it is, in the most rigid sense, conformable to it. The House of Representatives, like that of one branch at least of all the State legislatures, is elected immediately by the great body of the people. The Senate, like the present Congress and the Senate of Maryland, derives its appointment indirectly from the people. The President is indirectly derived from the choice of the people, according to the example in most of the States. Even the judges, with all other officers of the Union, will, as in the several States, be the choice, though a remote choice, of the people themselves. The duration of the appointments is equally conformable to the republican standard and to the model of State constitutions. The House of Representatives is periodically elective, as in all the States; and for the period of two years, as in the State of South Carolina. The Senate is elective, for the period of six years; which is but one year more than the period of the Senate of Maryland, and but two more than that of the Senates of New York and Virginia. The President is to continue in office for the period of four years; as in New York and Delaware the chief magistrate is elected for three years, and in South Carolina for two years. In the other States the election is annual. In several of the States, however, no constitutional provision is made for the impeachment of the chief magistrate. And in Delaware and Virginia he is not impeachable till out of office. The President of the United States is impeachable at any time during his continuance in office. The tenure by which the judges are to hold their places is, as it unquestionably ought to be, that of good behavior. The tenure of the ministerial offices generally will be a subject of legal

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regulation, conformably to the reason of the case and the example of the State constitutions.

Could any further proof be required of the republican complexion of this system, the most decisive one might be found in its absolute prohibition of titles of nobility, both under the federal and the State governments; and in its express guaranty of the republican form to each of the latter.

"But it was not sufficient," say the adversaries of the proposed Constitution, "for the convention to adhere to the republican form. They ought, with equal care, to have preserved the *federal* form, which regards the Union as a *Confederacy* of sovereign states; instead of which, they have framed a *national* government, which regards the Union as a *consolidation* of the States." And it is asked by what authority this bold and radical innovation was undertaken? The handle which has been made of this objection requires that it should be examined with some precision.

Without inquiring into the accuracy of the distinction on which the objection is founded, it will be necessary to a just estimate of its force, first, to ascertain the real character of the government in question; secondly, to inquire how far the convention were authorized to propose such a government; and thirdly, how far the duty they owed to their country could supply any defect of regular authority.

First.—In order to ascertain the real character of the government, it may be considered in relation to the foundation on which it is to be established; to the sources from which its ordinary powers are to be drawn; to the operation of those powers; to the extent of them; and to the authority by which future changes in the government are to be introduced.

On examining the first relation, it appears, on one hand, that the Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but, on the other, that this assent and ratification is to be given by the people, not as individuals composing one entire

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nation, but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State—the authority of the people themselves. The act, therefore, establishing the Constitution, will not be a *national*, but a *federal* act.

That it will be a federal and not a national act, as these terms are understood by the objectors—the act of the people, as forming so many independent States, not as forming one aggregate nation—is obvious from this single consideration, that it is to result neither from the decision of a *majority* of the people of the Union, nor from that of a *majority* of the States. It must result from the *unanimous* assent of the several States that are parties to it, differing no otherwise from their ordinary assent than in its being expressed, not by the legislative authority, but by that of the people themselves. Were the people regarded in this transaction as forming one nation, the will of the majority of the whole people of the United States would bind the minority in the same manner as the majority in each State must bind the minority; and the will of the majority must be determined, either by a comparison of the individual votes, or by considering the will of the majority of the States as evidence of the will of a majority of the people of the United States. Neither of these rules has been adopted. Each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new Constitution will, if established, be a *federal* and not a *national* constitution.

The next relation is to the sources from which the ordinary powers of government are to be derived. The House of Representatives will derive its powers from the people of America; and the people will be represented in the same proportion, and on the same principle, as they are in the legislature of a particular State. So far the government is *national*, not *federal*. The Senate, on the

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other hand, will derive its powers from the States, as political and coequal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress. So far the government is *federal*, not *national*. The executive power will be derived from a very compound source. The immediate election of the President is to be made by the States in their political characters. The votes allotted to them are in a compound ratio, which considers them partly as distinct and coequal societies, partly as unequal members of the same society. The eventual election, again, is to be made by that branch of the legislature which consists of the national representatives; but in this particular act they are to be thrown into the form of individual delegations, from so many distinct and coequal bodies politic. From this aspect of the government it appears to be of a mixed character, presenting at least as many *federal* as *national* features.

The difference between a federal and national government, as it relates to the *operation of the government*, is supposed to consist in this, that in the former the powers operate on the political bodies composing the Confederacy, in their political capacities; in the latter, on the individual citizens composing the nation, in their individual capacities. On trying the Constitution by this criterion, it falls under the *national*, not the *federal* character; though perhaps not so completely as has been understood. In several cases, and particularly in the trial of controversies to which States may be parties, they must be viewed and proceeded against in their collective and political capacities only. So far the national countenance of the government on this side seems to be disfigured by a few federal features. But this blemish is perhaps unavoidable in any plan; and the operation of the government on the people, in their individual capacities, in its ordinary and most essential proceedings, may, on the whole, designate it, in this relation, a *national* government.

But if the government be national with regard to the

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operation of its powers, it changes its aspect again when we contemplate it in relation to the *extent* of its powers. The idea of a national government involves in it not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government. Among a people consolidated into one nation, this supremacy is completely vested in the national legislature. Among communities united for particular purposes, it is vested partly in the general and partly in the municipal legislatures. In the former case, all local authorities are subordinate to the supreme; and may be controlled, directed, or abolished by it at pleasure. In the latter, the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them within its own sphere. In this relation, then, the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects. It is true that, in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact; and that it ought to be established under the general rather than under the local governments, or, to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated.

If we try the Constitution by its last relation to the authority by which amendments are to be made, we find it neither wholly *national* nor wholly *federal*. Were it wholly national, the supreme and ultimate authority

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would reside in the *majority* of the people of the Union; and this authority would be competent at all times, like that of a majority of every national society, to alter or abolish its established government. Were it wholly federal, on the other hand, the concurrence of each State in the Union would be essential to every alteration that would be binding on all. The mode provided by the plan of the convention is not founded on either of these principles. In requiring more than a majority, and particularly in computing the proportion by *States*, not by *citizens*, it departs from the *national* and advances towards the *federal* character; in rendering the concurrence of less than the whole number of States sufficient, it loses again the *federal* and partakes of the *national* character.

The proposed Constitution, therefore, is, in strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally, in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national.

PUBLIUS.

No. 40 [39]. (*New York Packet*, January 18, 1788.) Madison.

THE RIGHT OF THE CONVENTION TO FRAME SUCH A CONSTITUTION.

The authority under which the convention acted examined—Proper even to have exceeded authority, from consideration of duty—Constitution merely recommended—Necessity for a radical change—Whether the convention exceeded its powers does not affect the question of ratification.

To the People of the State of New York:

The *second* point to be examined is, whether the convention were authorized to frame and propose this mixed Constitution.

The powers of the convention ought, in strictness, to be deter-

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mined by an inspection of the commissions given to the members by their respective constituents. As all of these, however, had reference, either to the recommendation from the meeting at Annapolis, in September, 1786, or to that from Congress, in February, 1787, it will be sufficient to recur to these particular acts.

The act from Annapolis recommends the "appointment of commissioners to take into consideration the situation of the United States; to devise *such further provisions* as shall appear to them necessary to render the Constitution of the federal government *adequate to the exigencies of the Union;* and to report such an act for that purpose, to the United States in Congress assembled, as when agreed to by them, and afterwards confirmed by the legislature of every State, will effectually provide for the same."

The recommendatory act of Congress is in the words following: "Whereas, there is provision in the articles of Confederation and perpetual Union, for making alterations therein, by the assent of a Congress of the United States, and of the legislatures of the several States; and whereas experience hath evinced, that there are defects in the present Confederation; as a mean to remedy which, several of the States, and *particularly the State of New York*, by express instructions to their delegates in Congress, have suggested a convention for the purposes expressed in the following resolution; and such convention appearing to be the most probable mean of establishing in these States *a firm national government:*

"*Resolved*,—That in the opinion of Congress it is expedient, that on the second Monday of May next a convention of delegates, who shall have been appointed by the several States, be held at Philadelphia, for the sole and express purpose *of revising the articles of Confederation*, and reporting to Congress and the several legislatures such *alterations and provisions therein*, as shall, when agreed to in Congress, and confirmed by the States, render the federal Constitution *adequate to the exigencies of government* and *the preservation of the Union*."

From these two acts, it appears, 1st, that the object of the convention was to establish, in these States, *a firm national government;* 2d, that this government was to be such as would be *adequate to the exigencies of government and the preservation of the Union;* 3d, that these purposes were to be effected by *alterations and provisions in the articles of Confederation*, as it is expressed in the act of Congress, or by *such further provisions as should appear necessary*, as it stands in the recommendatory act from Annapolis; 4th, that the alterations and provisions were to be

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reported to Congress, and to the States, in order to be agreed to by the former and confirmed by the latter.

From a comparison and fair construction of these several modes of expression is to be deduced the authority under which the convention acted. They were to frame a *national government*, adequate to the *exigencies of government*, and *of the Union;* and to reduce the articles of Confederation into such form as to accomplish these purposes.

There are two rules of construction, dictated by plain reason, as well as founded on legal axioms. The one is that every part of the expression ought, if possible, to be allowed some meaning, and be made to conspire to some common end. The other is that where the several parts cannot be made to coincide, the less important should give way to the more important part; the means should be sacrificed to the end rather than the end to the means.

Suppose, then, that the expressions defining the authority of the convention were irreconcilably at variance with each other; that a *national* and *adequate government* could not possibly, in the judgment of the convention, be effected by *alterations* and *provisions* in the *articles of Confederation;* which part of the definition ought to have been embraced, and which rejected? Which was the more important, which the less important part? Which the end; which the means? Let the most scrupulous expositors of delegated powers; let the most inveterate objectors against those exercised by the convention, answer these questions. Let them declare whether it was of most importance to the happiness of the people of America that the articles of Confederation should be disregarded, and an adequate government be provided, and the Union preserved; or that an adequate government should be omitted, and the articles of Confederation preserved. Let them declare whether the preservation of these articles was the end for securing which a reform of the government was to be introduced as the means; or whether the establishment of a government, adequate to the national happiness, was the end at which these articles themselves originally aimed, and to which they ought, as insufficient means, to have been sacrificed.

But is it necessary to suppose that these expressions are absolutely irreconcilable to each other; that no *alterations* or *provisions* in *the articles of the Confederation* could possibly mold them into a national and adequate government; into such a government as has been proposed by the convention?

No stress, it is presumed, will, in this case, be laid on the *title;* a change of that could never be deemed an exercise of ungranted

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power. *Alterations* in the body of the instrument are expressly authorized. *New provisions* therein are also expressly authorized. Here then is a power to change the title; to insert new articles; to alter old ones. Must it of necessity be admitted that this power is infringed, so long as a part of the old articles remain? Those who maintain the affirmative ought at least to mark the boundary between authorized and usurped innovations; between that degree of change which lies within the compass of *alterations and further provisions*, and that which amounts to a *transmutation* of the government. Will it be said that the alterations ought not to have touched the substance of the Confederation? The States would never have appointed a convention with so much solemnity, nor described its objects with so much latitude, if some *substantial* reform had not been in contemplation. Will it be said that the *fundamental principles* of the Confederation were not within the purview of the convention, and ought not to have been varied? I ask, What are these principles? Do they require that, in the establishment of the Constitution, the States should be regarded as distinct and independent sovereigns? They are so regarded by the Constitution proposed. Do they require that the members of the government should derive their appointment from the legislatures, not from the people of the States? One branch of the new government is to be appointed by these legislatures; and under the Confederation, the delegates to Congress *may all* be appointed immediately by the people, and in two States* are actually so appointed. Do they require that the powers of the government should act on the States, and not immediately on individuals? In some instances, as has been shown, the powers of the new government will act on the States in their collective characters. In some instances, also, those of the existing government act immediately on individuals. In cases of capture; of piracy; of the post office; of coins, weights, and measures; of trade with the Indians; of claims under grants of land by different States; and, above all, in the case of trials by courts-martial in the army and navy, by which death may be inflicted without the intervention of a jury, or even of a civil magistrate—in all these cases the powers of the Confederation operate immediately on the persons and interests of individual citizens. Do these fundamental principles require, particularly, that no tax should be levied without the intermediate agency of the States? The Confederation itself authorizes a direct tax, to a certain extent, on the post office. The power of coinage has been so con-

* Connecticut and Rhode Island.—PUBLIUS.

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strued by Congress as to levy a tribute immediately from that source also. But pretermitting these instances, was it not an acknowledged object of the convention, and the universal expectation of the people, that the regulation of trade should be submitted to the general government in such a form as would render it an immediate source of general revenue? Had not Congress repeatedly recommended this measure as not inconsistent with the fundamental principles of the Confederation? Had not every State but one, had not New York herself, so far complied with the plan of Congress as to recognize the *principle* of the innovation? Do these principles, in fine, require that the powers of the general government should be limited, and that, beyond this limit, the States should be left in possession of their sovereignty and independence? We have seen that in the new government, as in the old, the general powers are limited; and that the States, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction.

The truth is that the great principles of the Constitution proposed by the convention may be considered less as absolutely new than as the expansion of principles which are found in the articles of Confederation. The misfortune under the latter system has been that these principles are so feeble and confined as to justify all the charges of inefficiency which have been urged against it, and to require a degree of enlargement which gives to the new system the aspect of an entire transformation of the old.

In one particular it is admitted that the convention have departed from the tenor of their commission. Instead of reporting a plan requiring the confirmation *of the legislatures of all the States*, they have reported a plan which is to be confirmed by the *people*, and may be carried into effect by *nine States only*. It is worthy of remark that this objection, though the most plausible, has been the least urged in the publications which have swarmed against the convention. The forbearance can only have proceeded from an irresistible conviction of the absurdity of subjecting the fate of twelve States to the perverseness or corruption of a thirteenth; from the example of inflexible opposition given by a *majority* of one sixtieth[1] of the people of America to a measure approved and called for by the voice of twelve States, comprising fifty-nine sixtieths of the people—an example still fresh in the memory and indignation of every citizen who has felt for the wounded honor and prosperity of his country. As this objection,

[1] Rhode Island refused to send delegates to the federal convention.—EDITOR.

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therefore, has been in a manner waived by those who have criticised the powers of the convention, I dismiss it without further observation.

The *third* point to be inquired into is, how far considerations of duty arising out of the case itself could have supplied any defect of regular authority.

In the preceding inquiries the powers of the convention have been analyzed and tried with the same rigor, and by the same rules, as if they had been real and final powers for the establishment of a Constitution for the United States. We have seen in what manner they have borne the trial even on that supposition. It is time now to recollect that the powers were merely advisory and recommendatory; that they were so meant by the States and so understood by the convention; and that the latter have accordingly planned and proposed a Constitution which is to be of no more consequence than the paper on which it is written, unless it be stamped with the approbation of those to whom it is addressed. This reflection places the subject in a point of view altogether different, and will enable us to judge with propriety of the course taken by the convention.

Let us view the ground on which the convention stood. It may be collected from their proceedings that they were deeply and unanimously impressed with the crisis which had led their country almost with one voice to make so singular and solemn an experiment for correcting the errors of a system by which this crisis had been produced; that they were no less deeply and unanimously convinced that such a reform as they have proposed was absolutely necessary to effect the purposes of their appointment. It could not be unknown to them that the hopes and expectations of the great body of citizens throughout this great empire were turned with the keenest anxiety to the event of their deliberations. They had every reason to believe that the contrary sentiments agitated the minds and bosoms of every external and internal foe to the liberty and prosperity of the United States. They had seen, in the origin and progress of the experiment, the alacrity with which the *proposition* made by a single State (Virginia) toward a partial amendment of the Confederation had been attended to and promoted. They had seen the *liberty assumed* by a *very few* deputies from a *very few* States, convened at Annapolis, of recommending a great and critical object, wholly foreign to their commission, not only justified by the public opinion but actually carried into effect by twelve out of the thirteen States. They had seen, in a variety of instances, assump-

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tions by Congress, not only of recommendatory, but of operative, powers, warranted, in the public estimation, by occasions and objects infinitely less urgent than those by which their conduct was to be governed. They must have reflected that, in all great changes of established governments, forms ought to give way to substance; that a rigid adherence in such cases to the former would render nominal and nugatory the transcendent and precious right of the people to "abolish or alter their governments as to them shall seem most likely to effect their safety and happiness,"* since it is impossible for the people spontaneously and universally to move in concert toward their object; and it is therefore essential that such changes be instituted by some *informal and unauthorized propositions*, made by some patriotic and respectable citizen or number of citizens. They must have recollected that it was by this irregular and assumed privilege of proposing to the people plans for their safety and happiness that the States were first united against the danger with which they were threatened by their ancient government; that committees and congresses were formed for concentrating their efforts and defending their rights; and that *conventions* were *elected* in *the several States* for establishing the constitutions under which they are now governed; nor could it have been forgotten that no little ill-timed scruples, no zeal for adhering to ordinary forms, were anywhere seen, except in those who wished to indulge, under these masks, their secret enmity to the substance contended for. They must have borne in mind that, as the plan to be framed and proposed was to be submitted *to the people themselves*, the disapprobation of this supreme authority would destroy it forever; its approbation blot out antecedent errors and irregularities. It might even have occurred to them that, where a disposition to cavil prevailed, their neglect to execute the degree of power vested in them, and still more their recommendation of any measure whatever, not warranted by their commission, would not less excite animadversion, than a recommendation at once of a measure fully commensurate to the national exigencies.

Had the convention, under all these impressions and in the midst of all these considerations, instead of exercising a manly confidence in their country, by whose confidence they had been so peculiarly distinguished, and of pointing out a system capable, in their judgment, of securing its happiness, taken the cold and sullen resolution of disappointing its ardent hopes, of sacrificing substance to forms, of committing the dearest interests of their country to the

* Declaration of Independence.—PUBLIUS.

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uncertainties of delay and the hazard of events, let me ask the man who can raise his mind to one elevated conception, who can awaken in his bosom one patriotic emotion, what judgment ought to have been pronounced by the impartial world, by the friends of mankind, by every virtuous citizen, on the conduct and character of this assembly? Or if there be a man whose propensity to condemn is susceptible of no control, let me then ask what sentence he has in reserve for the twelve States who *usurped the power* of sending deputies to the convention, a body utterly unknown to their constitutions; for Congress, who recommended the appointment of this body, equally unknown to the Confederation; and for the State of New York, in particular, which first urged and then complied with this unauthorized interposition?

But that the objectors may be disarmed of every pretext, it shall be granted for a moment that the convention were neither authorized by their commission, nor justified by circumstances in proposing a Constitution for their country: does it follow that the Constitution ought, for that reason alone, to be rejected? If, according to the noble precept, it be lawful to accept good advice even from an enemy, shall we set the ignoble example of refusing such advice even when it is offered by our friends? The prudent inquiry, in all cases, ought surely to be, not so much *from whom* the advice comes, as whether the advice be *good*.

The sum of what has been here advanced and proved is that the charge against the convention of exceeding their powers, except in one instance little urged by the objectors, has no foundation to support it; that if they had exceeded their powers, they were not only warranted, but required, as the confidential servants of their country, by the circumstances in which they were placed, to exercise the liberty which they assumed; and that finally, if they had violated both their powers and their obligations, in proposing a Constitution, this ought nevertheless to be embraced, if it be calculated to accomplish the views and happiness of the people of America. How far this character is due to the Constitution is the subject under investigation. PUBLIUS.

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No. 41 [40]. (*Independent Journal*, January 19, 1788.) Madison.

THE GENERAL VIEW OF THE POWERS SUPPOSED TO BE VESTED IN THE UNION.

The quality of power conferred—Not greater than it should be—General objections considered—The objects of the powers conferred—Declaring war and granting letters of marque—Providing armies and fleets—Regulating and calling out the militia—Levying taxes and borrowing money.

To the People of the State of New York:

The Constitution proposed by the convention may be considered under two general points of view. The FIRST relates to the sum or quantity of power which it vests in the government, including the restraints imposed on the States. The SECOND, to the particular structure of the government, and the distribution of this power among its several branches.

Under the *first* view of the subject, two important questions arise: 1. Whether any part of the powers transferred to the general government be unnecessary or improper? 2. Whether the entire mass of them be dangerous to the portion of jurisdiction left in the several States?

Is the aggregate power of the general government greater than ought to have been vested in it? This is the *first* question.

It cannot have escaped those who have attended with candor to the arguments employed against the extensive powers of the government, that the authors of them have very little considered how far these powers were necessary means of attaining a necessary end. They have chosen rather to dwell on the inconveniences which must be unavoidably blended with all political advantages; and on the possible abuses which must be incident to every power or trust of which a beneficial use can be made. This method of handling the subject cannot impose on the good sense of the people of America.

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It may display the subtlety of the writer; it may open a boundless field for rhetoric and declamation; it may inflame the passions of the unthinking, and may confirm the prejudices of the misthinking: but cool and candid people will at once reflect that the purest of human blessings must have a portion of alloy in them; that the choice must always be made, if not of the lesser evil, at least of the GREATER, not the PERFECT, good; and that, in every political institution, a power to advance the public happiness involves a discretion which may be misapplied and abused. They will see, therefore, that in all cases where power is to be conferred, the point first to be decided is, whether such a power be necessary to the public good; as the next will be, in case of an affirmative decision, to guard as effectually as possible against a perversion of the power to the public detriment.

That we may form a correct judgment on this subject, it will be proper to review the several powers conferred on the government of the Union; and that this may be the more conveniently done, they may be reduced into different classes as they relate to the following different objects: 1. Security against foreign danger; 2. Regulation of the intercourse with foreign nations; 3. Maintenance of harmony and proper intercourse among the States; 4. Certain miscellaneous objects of general utility; 5. Restraint of the States from certain injurious acts; 6. Provisions for giving due efficacy to all these powers.

The powers falling within the *first* class are those of declaring war and granting letters of marque; of providing armies and fleets; of regulating and calling forth the militia; of levying and borrowing money.

Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union. The powers requisite for attaining it must be effectually confided to the federal councils.

Is the power of declaring war necessary? No man will answer this question in the negative. It would be super-

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fluous, therefore, to enter into a proof of the affirmative. The existing Confederation establishes this power in the most ample form.

Is the power of raising armies and equipping fleets necessary? This is involved in the foregoing power. It is involved in the power of self-defense.

But was it necessary to give an INDEFINITE POWER of raising TROOPS as well as providing fleets; and of maintaining both in PEACE as well as in war?

The answer to these questions has been too far anticipated in another place to admit an extensive discussion of them in this place. The answer indeed seems to be so obvious and conclusive as scarcely to justify such a discussion in any place. With what color of propriety could the force necessary for defense be limited by those who cannot limit the force of offense? If a federal Constitution could chain the ambition or set bounds to the exertions of all other nations, then indeed might it prudently chain the discretion of its own government, and set bounds to the exertions for its own safety.

See No. 8.

How could a readiness for war in time of peace be safely prohibited, unless we could prohibit, in like manner, the preparations and establishments of every hostile nation? The means of security can only be regulated by the means and the danger of attack. They will, in fact, be ever determined by these rules and by no others. It is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions. If one nation maintains constantly a disciplined army, ready for the service of ambition or revenge, it obliges the most pacific nations who may be within the reach of its enterprises to take corresponding precautions. The fifteenth century was the unhappy epoch of military establishments in the time of peace. They were introduced by Charles VII. of France. All Europe has followed, or been forced into, the example. Had the example not been followed by other nations, all Europe must long ago have worn the chains of a universal monarch. Were every nation except France now to disband its peace establishments, the same event might follow. The veteran legions of

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Rome were an overmatch for the undisciplined valor of all other nations and rendered her the mistress of the world.

Not the less true is it that the liberties of Rome proved the final victim to her military triumphs; and that the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of her military establishments. A standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision. On the smallest scale it has its inconveniences. On an extensive scale its consequences may be fatal. On any scale it is an object of laudable circumspection and precaution. A wise nation will combine all these considerations; and, whilst it does not rashly preclude itself from any resource which may become essential to its safety, will exert all its prudence in diminishing both the necessity and the danger of resorting to one which may be inauspicious to its liberties.

The clearest marks of this prudence are stamped on the proposed Constitution. The Union itself, which it cements and secures, destroys every pretext for a military establishment which could be dangerous. America united, with a handful of troops, or without a single soldier, exhibits a more forbidding posture to foreign ambition than America disunited, with a hundred thousand veterans ready for combat. It was remarked on a former occasion that the want of this pretext had saved the liberties of one nation in Europe. Being rendered by her insular situation and her maritime resources impregnable to the armies of her neighbors, the rulers of Great Britain have never been able, by real or artificial dangers, to cheat the public into an extensive peace establishment. The distance of the United States from the powerful nations of the world gives them the same happy security. A dangerous establishment can never be necessary or plausible, so long as they continue a united people. But let it never, for a moment, be forgotten that they are indebted for this advantage to the Union alone. The moment of its dissolution will be the date of a new order of things. The fears of the weaker, or the ambition of the stronger, States or Confederacies, will set the same example in the New, as Charles VII. did in the Old World. The example will be followed here from the same motives which produced universal imitation there. Instead of deriving from our situation the precious advantage which Great Britain has derived from hers, the face of America will be but a copy of that of the continent of Europe. It will present liberty everywhere crushed between standing armies and perpetual taxes. The fortunes of disunited America will be even more disastrous than those of Europe. The

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sources of evil in the latter are confined to her own limits. No superior powers of another quarter of the globe intrigue among her rival nations, inflame their mutual animosities, and render them the instruments of foreign ambition, jealousy, and revenge. In America the miseries springing from her internal jealousies, contentions, and wars, would form a part only of her lot. A plentiful addition of evils would have their source in that relation in which Europe stands to this quarter of the earth, and which no other quarter of the earth bears to Europe.

This picture of the consequences of disunion cannot be too highly colored or too often exhibited. Every man who loves peace, every man who loves his country, every man who loves liberty, ought to have it ever before his eyes, that he may cherish in his heart a due attachment to the Union of America, and be able to set a due value on the means of preserving it.

Next to the effectual establishment of the Union, the best possible precaution against danger from standing armies is a limitation of the term for which revenue may be appropriated to their support. This precaution the Constitution has prudently added. I will not repeat here the observations which I flatter myself have placed this subject in a just and satisfactory light. But it may not be improper to take notice of an argument against this part of the Constitution which has been drawn from the policy and practice of Great Britain. It is said that the continuance of an army in that kingdom requires an annual vote of the legislature; whereas the American Constitution has lengthened this critical period to two years. This is the form in which the comparison is usually stated to the public: but is it a just form? Is it a fair comparison? Does the British Constitution restrain the parliamentary discretion to one year? Does the American impose on the Congress appropriations for two years? On the contrary, it cannot be unknown to the authors of the fallacy themselves that the British Constitution fixes no limit whatever to the discretion of the legislature, and that the American ties down the legislature to two years, as the longest admissible term.

Had the argument from the British example been truly stated, it would have stood thus: The term for which supplies may be appropriated to the army establishment, though unlimited by the British Constitution, has nevertheless, in practice, been limited by parliamentary discretion to a single year. Now, if in Great Britain, where the House of Commons is elected for seven years; where so great a proportion of the members are elected by so small a proportion of the people; where the electors are so cor-

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rupted by the representatives, and the representatives so corrupted by the Crown,[1] the representative body can possess a power to make appropriations to the army for an indefinite term, without desiring or without daring to extend the term beyond a single year, ought not suspicion herself to blush, in pretending that the representatives of the United States, elected FREELY by the WHOLE BODY of the people every SECOND YEAR, cannot be safely intrusted with the discretion over such appropriations, expressly limited to the short period of TWO YEARS?

A bad cause seldom fails to betray itself. Of this truth, the management of the opposition to the federal government is an unvaried exemplification. But among all the blunders which have been committed, none is more striking than the attempt to enlist on that side the prudent jealousy entertained by the people, of standing armies. The attempt has awakened fully the public attention to that important subject; and has led to investigations which must terminate in a thorough and universal conviction, not only that the Constitution has provided the most effectual guards against danger from that quarter, but that nothing short of a Constitution fully adequate to the national defense and the preservation of the Union can save America from as many standing armies as it may be split into States or Confederacies, and from such a progressive augmentation of these establishments in each as will render them as burdensome to the properties and ominous to the liberties of the people as any establishment that can become necessary, under a united and efficient government, must be tolerable to the former and safe to the latter.

The palpable necessity of the power to provide and maintain a navy has protected that part of the Constitution against a spirit of censure which has spared few other parts. It must, indeed, be numbered among the greatest blessings of America that, as her Union will be the only source of her maritime strength, so this will be a principal source of her security against danger from abroad. In this respect our situation bears another likeness to the insular advantage of Great Britain. The batteries most capable of repelling foreign enterprises on our safety are happily such as can never be turned by a perfidious government against our liberties.

[1] The extent to which the English king corrupted Parliament is well shown in the tenth Report of the British Historical MSS. Commission, vi. pp. 7–11.—EDITOR.

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The inhabitants of the Atlantic frontier are all of them deeply interested in this provision for naval protection, and if they have hitherto been suffered to sleep quietly in their beds; if their property has remained safe against the predatory spirit of licentious adventurers; if their maritime towns have not yet been compelled to ransom themselves from the terrors of a conflagration, by yielding to the exactions of daring and sudden invaders, these instances of good fortune are not to be ascribed to the capacity of the existing government for the protection of those from whom it claims allegiance, but to causes that are fugitive and fallacious. If we except perhaps Virginia and Maryland, which are peculiarly vulnerable on their eastern frontiers, no part of the Union ought to feel more anxiety on this subject than New York. Her sea-coast is extensive. A very important district of the State is an island. The State itself is penetrated by a large navigable river for more than fifty leagues. The great emporium of its commerce, the great reservoir of its wealth, lies every moment at the mercy of events, and may almost be regarded as a hostage for ignominious compliances with the dictates of a foreign enemy, or even with the rapacious demands of pirates and barbarians. Should a war be the result of the precarious situation of European affairs, and all the unruly passions attending it be let loose on the ocean, our escape from insults and depredations, not only on that element, but every part of the other bordering on it, will be truly miraculous. In the present condition of America, the States more immediately exposed to these calamities have nothing to hope from the phantom of a general government which now exists; and if their single resources were equal to the task of fortifying themselves against the danger, the objects to be protected would be almost consumed by the means of protecting them.[1]

[1] The reverse of this has been the experience. Although the seaport cities contribute enormously to the national revenues, the fact that these revenues are controlled by the central states has always prevented an adequate fortification. So early as 1806, when New York City peti-

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The power of regulating and calling forth the militia has been already sufficiently vindicated and explained.

The power of levying and borrowing money, being the sinew of that which is to be exerted in the national defense, is properly thrown into the same class with it. This power, also, has been examined already with much attention, and has, I trust, been clearly shown to be necessary, both in the extent and form given to it by the Constitution. I will address one additional reflection only to those who contend that the power ought to have been restrained to external taxation—by which they mean taxes on articles imported from other countries. It cannot be doubted that this will always be a valuable source of revenue; that for a considerable time it must be a principal source; that at this moment it is an essential one. But we may form very mistaken ideas on this subject, if we do not call to mind in our calculations, that the extent of revenue drawn from foreign commerce must vary with the variations, both in the extent and the kind of imports; and that these variations do not correspond with the progress of population, which must be the general measure of the public wants. As long as agriculture continues the sole field of labor, the importation of manufactures must increase as the consumers multiply. As soon as domestic manufactures are begun by the hands not called for by agriculture, the imported manufactures will decrease as the numbers of people increase. In a more remote

See Nos. 30-36.

tioned Congress, and described its unprotected condition, Jefferson urged upon that body that the "Atlantic frontier, from numbers, wealth, and exposure to potent enemies, have a proportionate right to be defended with the Western frontier, for whom we keep up three thousand men." During the war of 1812, New York, Boston, and Newport were forced to fortify themselves largely at their own expense, while the general government even refused troops to New England. The last appeal to Congress to protect its greatest source of revenue was from Samuel J. Tilden, in an open letter to the speaker of the House of Representatives (Bigelow's "Tilden," ii. 306), in which the cause of the commercial cities was admirably stated. Had New York retained possession of the impost from revenues centering in her port, there would to-day be fewer public buildings in Western towns, and more guns protecting her harbor.—EDITOR.

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stage, the imports may consist in a considerable part of raw materials, which will be wrought into articles for exportation, and will, therefore, require rather the encouragement of bounties than to be loaded with discouraging duties. A system of government meant for duration ought to contemplate these revolutions, and be able to accommodate itself to them.

Some, who have not denied the necessity of the power of taxation, have grounded a very fierce attack against the Constitution on the language in which it is defined. It has been urged and echoed, that the power "to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States," amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare.[1] No stronger proof could be given of the distress under which these writers labor for objections than their stooping to such a misconstruction.

Had no other enumeration or definition of the powers of the Congress been found in the Constitution than the general expressions just cited, the authors of the objection might have had some color for it; though it would have been difficult to find a reason for so awkward a form of describing an authority to legislate in all possible cases. A power to destroy the freedom of the press, the trial by

[1] It is needless to say that this power to "provide for the common defense and general welfare" has been the battleground of almost every question of national politics from the adoption of the constitution to the present day. Alexander Johnston goes so far as to say that all issues not based on this question "have been either local and temporary, or selfish and misleading, and the general acceptance of any such party difference would mark an unfortunate decline in the political intelligence of the people." The narrow view, here expressed by Madison, he held consistently, while in the opposition. It first found definite expression in Jefferson's "Opinion on the Constitutionality of the National Bank" (1791); Hamilton's counter-opinion on the same question is to this day considered the ablest argument for the broad constructionist point of view. (See Appendix, p. 651). The Democratic party has always been theoretically in favor of strict construction, but in practice it has often taken an opposite position. Every party in the United States has shown variability on this policy, solely according to whether it held the

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jury, or even to regulate the course of descents, or the forms of conveyances, must be very singularly expressed by the terms "to raise money for the general welfare."

But what color can the objection have, when a specification of the objects alluded to by these general terms immediately follows, and is not even separated by a longer pause than a semicolon? If the different parts of the same instrument ought to be so expounded as to give meaning to every part which will bear it, shall one part of the same sentence be excluded altogether from a share in the meaning; and shall the more doubtful and indefinite terms be retained in their full extent, and the clear and precise expressions be denied any signification whatsoever? For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity, which, as we are reduced to the dilemma of charging either on the authors of the objection or on the authors of the Constitution, we must take the liberty of supposing had not its origin with the latter.

The objection here is the more extraordinary, as it

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reins of power, or was acting in the opposition. Thus the encroachments or rather assumptions of new power can be divided with evenness among our political parties. The Federalists chartered the United States Bank; the Democrats bought Louisiana, constructed a national road, and originated the first "protective" legislation and internal improvements; the Whigs carried the protective theory to an extreme, and advocated river and harbor improvements; the Republicans advocated governmental building of railroads, enacted the draft, and created the legal tender; the Democrats forced the creation of the electoral commission, and were responsible for the first institution of bounties by the silver purchase laws; the Republicans attempted to legislate federal interference in elections, passed the interstate commerce law, and granted bounties in direct terms; the Democrats sought to make an income tax an indirect tax, and, against the protest of a State government, used the federal authority to crush insurrections.—EDITOR.

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appears that the language used by the convention is a copy from the articles of Confederation. The objects of the Union among the States, as described in article third, are, "their common defense, security of their liberties, and mutual and general welfare." The terms of article eighth are still more identical: "All charges of war and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress, shall be defrayed out of a common treasury," etc. A similar language again occurs in article ninth. Construe either of these articles by the rules which would justify the construction put on the new Constitution, and they vest in the existing Congress a power to legislate in all cases whatsoever. But what would have been thought of that assembly, if, attaching themselves to these general expressions, and disregarding the specifications which ascertain and limit their import, they had exercised an unlimited power of providing for the common defense and general welfare? I appeal to the objectors themselves, whether they would in that case have employed the same reasoning in justification of Congress as they now make use of against the convention. How difficult it is for error to escape its own condemnation!

PUBLIUS.

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No. 42 [41]. (*New York Packet*, January 22, 1788.) Madison.

POWERS GOVERNING INTERCOURSE WITH FOREIGN NATIONS AND BETWEEN THE STATES.

Regulation of intercourse with foreign nations—Ambassadors, consuls, and treaties—Punishment of piracy, felonies on the high seas, and offenses against the laws of nations—Regulation of foreign commerce—The sanction of the slave trade—Objection on that point considered—Maintenance of harmony and proper intercourse among the states—Interstate commerce and the Indian trade—Coinage of money—Punishment of counterfeiters—Standard of weights and measures—Naturalization—Bankruptcy laws—Rule for providing public acts—Post roads and post offices.

To the People of the State of New York:

The *second* class of powers lodged in the general government consists of those which regulate the intercourse with foreign nations, to wit: to make treaties; to send and receive ambassadors, other public ministers, and consuls; to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; to regulate foreign commerce, including a power to prohibit, after the year 1808, the importation of slaves, and to lay an intermediate duty of ten dollars per head, as a discouragement to such importations.

This class of powers forms an obvious and essential branch of the federal administration. If we are to be one nation in any respect, it clearly ought to be in respect to other nations.

The powers to make treaties and to send and receive ambassadors speak their own propriety. Both of them are comprised in the articles of Confederation, with this difference only, that the former is disembarrassed by the plan of the convention of an exception, under which treaties might be substantially frustrated by regulations of the States; and that a power of appointing and receiving "other public ministers and consuls," is expressly and very properly added to the former provision con-

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cerning ambassadors. The term ambassador, if taken strictly, as seems to be required by the second of the articles of Confederation, comprehends the highest grade only of public ministers, and excludes the grades which the United States will be most likely to prefer, where foreign embassies may be necessary. And under no latitude of construction will the term comprehend consuls. Yet it has been found expedient, and has been the practice of Congress, to employ the inferior grades of public ministers, and to send and receive consuls.

It is true that where treaties of commerce stipulate for the mutual appointment of consuls, whose functions are connected with commerce, the admission of foreign consuls may fall within the power of making commercial treaties; and that, where no such treaties exist, the mission of American consuls into foreign countries may *perhaps* be covered under the authority, given by the ninth article of the Confederation, to appoint all such civil officers as may be necessary for managing the general affairs of the United States. But the admission of consuls into the United States, where no previous treaty has stipulated it, seems to have been nowhere provided for. A supply of the omission is one of the lesser instances in which the convention have improved on the model before them. But the most minute provisions become important when they tend to obviate the necessity or the pretext for gradual and unobserved usurpations of power. A list of the cases in which Congress have been betrayed, or forced by the defects of the Confederation, into violations of their chartered authorities, would not a little surprise those who have paid no attention to the subject; and would be no inconsiderable argument in favor of the new Constitution, which seems to have provided no less studiously for the lesser than the more obvious and striking defects of the old.

The power to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations, belongs with equal propriety to the general government, and is a still greater improvement on the

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articles of Confederation. These articles contain no provision for the case of offenses against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations. The provision of the federal articles on the subject of piracies and felonies extends no further than to the establishment of courts for the trial of these offenses. The definition of piracies might, perhaps without inconveniency, be left to the law of nations; though a legislative definition of them is found in most municipal codes. A definition of felonies on the high seas is evidently requisite. Felony is a term of loose signification, even in the common law of England; and of various import in the statute law of that kingdom. But neither the common nor the statute law of that, or of any other nation, ought to be a standard for the proceedings of this, unless previously made its own by legislative adoption. The meaning of the term, as defined in the codes of the several States, would be as impracticable as the former would be a dishonorable and illegitimate guide. It is not precisely the same in any two of the States; and varies in each with every revision of its criminal laws. For the sake of certainty and uniformity, therefore, the power of defining felonies in this case was in every respect necessary and proper.

The regulation of foreign commerce, having fallen within several views which have been taken of this subject, has been too fully discussed to need additional proofs here of its being properly submitted to the federal administration.

See No. 11.

It were doubtless to be wished that the power of prohibiting the importation of slaves had not been postponed until the year 1808, or rather that it had been suffered to have immediate operation.[1] But it is not

[1] The slave-trade clause was the result of a compromise, without which the constitution would scarcely have commanded the votes of a majority of the convention which framed, much less of the states which ratified it. The Carolinas and Georgia had lost a large part of their slaves by British plundering during the revolution, and possessing large tracts of uncultivated land, they wished to make labor as cheap as possible by per-

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difficult to account, either for this restriction on the general government, or for the manner in which the whole clause is expressed. It ought to be considered as a great point gained in favor of humanity that a period of twenty years may terminate forever, within these States, a traffic which has so long and so loudly upbraided the barbarism of modern policy; that within that period it will receive a considerable discouragement from the federal government, and may be totally abolished, by a concurrence of the few States which continue the unnatural traffic, in the prohibitory example which has been given by so great a majority of the Union. Happy would it be for the unfortunate Africans if an equal prospect lay before them of being redeemed from the oppressions of their European brethren!

See No. 52.

Attempts have been made to pervert this clause into an objection against the Constitution, by representing it on one side as a criminal toleration of an illicit practice, and on another as calculated to prevent voluntary and beneficial emigrations from Europe to America. I men-

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mitting the free importation of negroes. United with them in the desire to maintain the slave trade were Massachusetts and Rhode Island, for in these states the larger part of this profitable traffic centered. The aid of the other New England states was secured by the clause giving to Congress power to pass a navigation act by a simple majority, and thus by the vote of the four New England states and of the three southern states, against the votes of New Jersey, Pennsylvania, Delaware, and Virginia (New York unrepresented in the convention), the slave trade was fastened upon the country for twenty years; but for this it is probable that the slavery question would hardly have assumed the serious proportions that it eventually developed. Already, however, both Virginia and Maryland were finding the breeding of slaves for the southern market a source of profit, and to this fact, more than to any true humanitarian sentiment, was due their attitude on this question; for the ending of the slave trade meant a higher price for negroes, and therefore a greater profit from them. Influenced by this desire not to close a market without her own boundaries for the slaves already unprofitable for agricultural purposes, Virginia in 1784 voted against the exclusion of slavery from all the western territory. The enormous profits which these states later secured, after the stopping of the slave trade, by raising negroes for sale in the south and west, show that they, quite as much as their more southern neighbors and the New England states, were voting for what seemed their best interests, regardless of moral considerations.—EDITOR.

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tion these misconstructions, not with a view to give them an answer, for they deserve none, but as specimens of the manner and spirit in which some have thought fit to conduct their opposition to the proposed government.

The powers included in the *third* class are those which provide for the harmony and proper intercourse among the States.

Under this head might be included the particular restraints imposed on the authority of the States, and certain powers of the judicial department; but the former are reserved for a distinct class, and the latter will be particularly examined when we arrive at the structure and organization of the government. I shall confine myself to a cursory review of the remaining powers comprehended under this third description, to wit: to regulate commerce among the several States and the Indian tribes; to coin money, regulate the value thereof, and of foreign coin; to provide for the punishment of counterfeiting the current coin and securities of the United States; to fix the standard of weights and measures; to establish a uniform rule of naturalization, and uniform laws of bankruptcy; to prescribe the manner in which the public acts, records, and judicial proceedings of each State shall be proved, and the effect they shall have in other States; and to establish post offices and post roads.

The defect of power in the existing Confederacy to regulate the commerce between its several members is in the number of those which have been clearly pointed out by experience. To the proofs and remarks which former papers have brought into view on this subject, it may be added that, without this supplemental provision, the great and essential power of regulating foreign commerce would have been incomplete and ineffectual. A very material object of this power was the relief of the States, which import and export through other States, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out to load the articles of import and

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export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former. We may be assured by past experience that such a practice would be introduced by future contrivances; and both by that and a common knowledge of human affairs, that it would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquillity. To those who do not view the question through the medium of passion or of interest, the desire of the commercial States to collect, in any form, an indirect revenue from their uncommercial neighbors, must appear not less impolitic than it is unfair; since it would stimulate the injured party, by resentment as well as interest, to resort to less convenient channels for their foreign trade. But the mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned, before public bodies as well as individuals, by the clamors of an impatient avidity for immediate and immoderate gain.

The necessity of a superintending authority over the reciprocal trade of confederated States, has been illustrated by other examples as well as our own. In Switzerland, where the Union is so very slight, each canton is obliged to allow to merchandises a passage through its jurisdiction into other cantons, without an augmentation of the tolls. In Germany it is a law of the empire that the princes and states shall not lay tolls or customs on bridges, rivers, or passages, without the consent of the emperor and the diet; though it appears from a quotation in an antecedent paper that the practice in this, as in many other instances in that confederacy, has not followed the law, and has produced there the mischiefs which have been foreseen here. Among the restraints imposed by the Union of the Netherlands on its members, one is that they shall not establish imposts disadvantageous to their neighbors, without the general permission.

The regulation of commerce with the Indian tribes is

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very properly unfettered from two limitations in the articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the articles of Confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union with complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part and letting the whole remain.

All that need be remarked on the power to coin money, regulate the value thereof and of foreign coin is that, by providing for this last case, the Constitution has supplied a material omission in the articles of Confederation. The authority of the existing Congress is restrained to the regulation of coin *struck* by their own authority or that of the respective States. It must be seen at once that the proposed uniformity in the *value* of the current coin might be destroyed by subjecting that of foreign coin to the different regulations of the different States.

The punishment of counterfeiting the public securities, as well as the current coin, is submitted of course to that authority which is to secure the value of both.

The regulation of weights and measures is transferred from the articles of Confederation, and is founded on like considerations with the preceding power of regulating coin.

The dissimilarity in the rules of naturalization has long been remarked as a fault in our system, and as laying a foundation for intricate and delicate questions. In

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the fourth article of the Confederation it is declared "that the *free inhabitants* of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of *free citizens* in the several States; and *the people* of each State shall, in every other, enjoy all the privileges of trade and commerce," etc. There is a confusion of language here, which is remarkable. Why the terms *free inhabitants* are used in one part of the article, *free citizens* in another, and *people* in another; or what was meant by superadding to "all privileges and immunities of free citizens," "all the privileges of trade and commerce," cannot easily be determined. It seems to be a construction scarcely avoidable, however, that those who come under the denomination of *free inhabitants* of a State, although not citizens of such State, are entitled, in every other State, to all the privileges of *free citizens* of the latter: that is, to greater privileges than they may be entitled to in their own State; so that it may be in the power of a particular State, or rather every State is laid under a necessity, not only to confer the rights of citizenship in other States upon any whom it may admit to such rights within itself, but upon any whom it may allow to become inhabitants within its jurisdiction. But were an exposition of the term "inhabitants" to be admitted which would confine the stipulated privileges to citizens alone, the difficulty is diminished only, not removed. The very improper power would still be retained by each State of naturalizing aliens in every other State. In one State, residence for a short term confirms all the rights of citizenship; in another, qualifications of greater importance are required. An alien, therefore, legally incapacitated for certain rights in the latter may, by previous residence only in the former, elude his incapacity; and thus the law of one State be preposterously rendered paramount to the law of another, within the jurisdiction of the other. We owe it to mere casualty that very serious embarrassments on this subject have been hitherto escaped. By the laws of several States, certain descrip-

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tions of aliens,[1] who had rendered themselves obnoxious, were laid under interdicts inconsistent not only with the rights of citizenship but with the privilege of residence. What would have been the consequence if such persons, by residence or otherwise, had acquired the character of citizens under the laws of another State, and then asserted their rights as such, both to residence and citizenship, within the State proscribing them? Whatever the legal consequences might have been, other consequences would probably have resulted of too serious a nature not to be provided against. The new Constitution has accordingly, with great propriety, made provision against them, and all others proceeding from the defect of the Confederation on this head, by authorizing the general government to establish a uniform rule of naturalization throughout the United States.

The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question.

The power of prescribing by general laws the manner in which the public acts, records, and judicial proceedings of each State shall be proved, and the effect they shall have in other States, is an evident and valuable improvement on the clause relating to this subject in the articles of Confederation. The meaning of the latter is extremely indeterminate, and can be of little importance under any interpretation which it will bear. The power here established may be rendered a very convenient instrument of justice, and be particularly beneficial on the borders of contiguous States, where the effects liable to justice may be suddenly and secretly translated, in any stage of the process, within a foreign jurisdiction.

The power of establishing post roads must in every view be a harmless power, and may perhaps by judi-

[1] The loyalists.—EDITOR.

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cious management become productive of great public conveniency. Nothing which tends to facilitate the intercourse between the States can be deemed unworthy of the public care.[1] PUBLIUS.

No. 43 [42]. (*Independent Journal*, January 23, 1788.) Madison.

MISCELLANEOUS POWERS.

Miscellaneous powers—Copyrights and patents—The federal city—Punishment of treason—Admission of new states—Government of territories and control of public property—Guaranty to every state of a republican form of government—Protection of state against invasion and against domestic violence—Assumption of payment of outstanding debts—Amendments to the constitution—The establishment of this government on the adherence of nine states—Objection that this is a violation of the confederation—Relations between ratifying states and those which refuse to ratify.

To the People of the State of New York:

The *fourth* class comprises the following miscellaneous powers:

1. A power "to promote the progress of science and useful arts, by securing, for a limited time, to authors

[1] This question of public or internal improvement, here so briefly touched upon, has been one of the gravest questions of party politics in national history, and probably has done more to increase the power of the general government than any other single factor in our development. This is owing to the fact that the newer states have generally been those in which the true democratic spirit was strongest, yet which by their real poverty were the most eager to have public improvements undertaken by the general government, thus largely neutralizing their natural jealousy of national assumption of power. The first true step in this direction was the undertaking of the Cumberland road, a measure carried by the western Democrats in 1808 and approved by Jefferson. So powerfully did the sentiment express itself that, though contrary to his real belief, Jefferson was induced to recommend to Congress the undertaking of "roads, rivers, canals, and such other objects of public improvement as it may be thought proper" (though he stipulated that this should be preceded by an amendment to the constitution), and his Secretary of the Treasury in 1808 recommended to Congress the voting of $16,000,000 for the construction of public roads. After a ten-years' fight of the Democrats in Congress against the strict construction views of their own Presidents (Madison and Monroe), in 1823 the first appropriation for

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and inventors, the exclusive right to their respective writings and discoveries."

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point by laws passed at the instance of Congress.

2. "To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may by cession of particular States and the acceptance of Congress, become the seat of the government of the United States; and to exercise like authority over all places purchased by the consent of the legislatures of the States in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."

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harbor improvement was carried, and the next year a bill authorizing surveys for a national canal was passed. With the accession of Jackson the movement encountered an opponent who checked its further progress for eight years. Several river and harbor bills were passed by succeeding Congresses, only to be vetoed by the President holding office. Failing in this attempt at extension the Democratic party tried to attain the wishes of its masses, without completely stultifying its concept of national powers, by distributing to the states surplus revenue, that public improvements might be made by them. A further expansion came in 1850 with the grant of public lands to encourage the building of railroads; this was quickly followed by the governmental survey of a road to the Pacific, by the declaration in both party platforms that such a railroad should be built by the government, and by the voting of the nation's credit to help build it. In 1870 a river and harbor bill was made a law; and though that has become an annual bill, it is still likely to be vetoed, not because its constitutionality is longer debatable, but because of the "jobs" it embodies. Finally, through this very "post-road" clause, together with the power to regulate commerce, the government by the recent interstate commerce law has practically extended its control to all railroads (for the tendency to consolidate small roads into great systems will probably put them all shortly under the interstate law). How absolute this power has become is shown by the late "government by injunction"; by the use of federal troops to protect railroads; and by the construing of the anti trust law so as to control the traffic agreements of the railroads.—EDITOR.

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The indispensable necessity of complete authority at the seat of government carries its own evidence with it. It is a power exercised by every legislature of the Union, I might say of the world, by virtue of its general supremacy. Without it, not only the public authority might be insulted and its proceedings interrupted with impunity; but a dependence of the members of the general government on the State comprehending the seat of the government, for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the Confederacy. This consideration has the more weight, as the gradual accumulation of public improvements at the stationary residence of the government would be both too great a public pledge to be left in the hands of a single State, and would create so many obstacles to a removal of the government as still further to abridge its necessary independence.[1] The extent of this federal district is sufficiently circumscribed to satisfy every jealousy of an opposite nature. And as it is to be appropriated to this use with the consent of the State ceding it; as the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will have had their voice in the election of the government which is to exercise authority over them; as a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them;[2] and as the

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[1] The experience of the Congress of the Confederation proved the evils of a seat in a city over which it had no jurisdiction, for when a small part of the Pennsylvania militia mutinied in 1783, and threatened Congress with violence, the Pennsylvania Council refused to use force to suppress the soldiers, and compelled Congress in self-protection to adjourn to Princeton.—EDITOR.

[2] As a fact, the history of the District of Columbia has been very different, Congress having retained a control over the capital more absolute even than that over the territories, save only in the years 1871–74, when a "territorial" degree of local self-government was allowed to it, which

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authority of the legislature of the State, and of the inhabitants of the ceded part of it, to concur in the cession, will be derived from the whole people of the State, in their adoption of the Constitution, every imaginable objection seems to be obviated.

The necessity of a like authority over forts, magazines, etc., established by the general government, is not less evident. The public money expended on such places, and the public property deposited in them, require that they should be exempt from the authority of the particular State.[1] Nor would it be proper for the places on which the security of the entire Union may depend, to be in any degree dependent on a particular member of it. All objections and scruples are here also obviated by requiring the concurrence of the States concerned in every such establishment.

3. "To declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted."

As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it. But as newfangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the Congress, even

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resulted in the scandals of "Boss" Shepherd. So far from being allowed to conduct their own government, its residents are granted no voice in national elections unless they claim residence and have formerly voted elsewhere; in that case, they may return to that place and cast their votes.—EDITOR.

[1] It was this national ownership of forts which allowed Buchanan to notify the South Carolina senators that Fort Sumter "belonged to the United States. . . and if assaulted by the authorities of South Carolina, on them would rest the exclusive responsibility of commencing civil war."—EDITOR.

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in punishing it, from extending the consequences of guilt beyond the person of its author.

4. "To admit new States into the Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned, as well as of the Congress."[1]

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[1] Under the treaty of 1783, a large tract of land bounded by the great lakes, the Mississippi, and parallel 31°, was confirmed to the United States. Although the whole territory was actually vested in several states; its possession was thus complicated by conflicting claims, and even by the assertion of certain states that these lands fairly belonged to the nation and not to the individual states. The difficulty was finally settled by each state ceding to the nation its rights and claims conditional on the territory being eventually made into states and allowed to join the Union. This particular clause was inserted in the constitution, that these conditions might be fulfilled.

The clause relating to possible division of the old states was undoubtedly forced on the framers by the ferment in Kentucky at this time, that section being then part of Virginia, although for four years it had been petitioning Congress for statehood. So, too, the western territory of North Carolina had revolted from the parent State, and had set up a separate statehood under the title of "Franklin." Vermont also had secured its independence from New York. In each case the legislature of the parent state was brought to consent to such separation, and this was later true in the creation of the state of Maine, originally a part of Massachusetts. It would have been difficult, in view of this clause, for Congress and the supreme court to meet the possible threatened division of New York state (see p. xxvi); but presumably the flexibility of our government would have found some means of getting over the constitutional difficulty. The creation of the state of West Virginia during the Civil War was made constitutional by the invention of a legal fiction. The forty western or "over-the-mountain counties," which were strongly unionist, voted against the secession of the state in the Virginia convention of 1861, and when the convention passed the secession ordinance, they called another convention and repealed it. They then declared their separation from eastern Virginia, framed a constitution, and asked recognition by the Union. Though this was the very division guarded against by this clause, the stress of war forced a recognition, which was given on the quibble that the legislature of Western Virginia was the legal legislature of Virginia. Fernando Wood's proposition in 1861, that New York city should secede from the Union and make itself a free city, (McPherson's "History of the Rebellion," p. 42), hardly falls within the conditions of the clause, for it was essentially based on a right of force and not of law. The more recent issue raised by the advocacy of a new state made up of the so-called New York "metropolitan district," however, comes within the provision of the clause, and may possibly produce a constitutional question in the future.

In this clause the framers made no provision for the acquisition of ter-

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In the articles of Confederation, no provision is found on this important subject. Canada was to be admitted of right, on her joining in the measures of the United States; and the other *colonies*, by which were evidently meant the other British colonies, at the discretion of nine States. The eventual establishment of *new States* seems to have been overlooked by the compilers of that instrument. We have seen the inconvenience of this omission, and the assumption of power into which Con-

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ritory by the Union, and this strange oversight caused Jefferson great embarrassment when the purchase of Louisiana was arranged, for in his own words, it made "waste paper" of the constitution, and he went so far as to draft an amendment to the constitution (see Appendix p. 686), dealing with what he said was "the case of a guardian, investing the money of his ward in purchasing an important adjacent territory; saying to him when of age, 'I did this for your good; I pretend to no right to bind you: you may disavow me.'" Some of the northern states, which saw in this addition of territory a destruction of balance between the north and south, protested against the acquisition; but, as a fact, it was from the territory so secured that those northwestern states were created which were eventually to give political supremacy to the north in the sectional issues of 1820–1860. In time the south came to realize this, and vainly sought, by the Mexican war and by the proposed purchase of Cuba, to counteract the result. Since the acquisition of Louisiana, constant additions have been made to our territory, (1) by permitting foreign countries to become states (Texas); (2) by conquest (California, etc.); and (3) by purchase (Alaska).

A far graver constitutional difficulty, for which the framers likewise made no constitutional provision, is the distinct future possibility that through an unsuccessful war there may come a necessity for the ceding of territory. Great Britain attempted to obtain this in 1814, by demanding not merely the creation of a neutral Indian territory in the west, but even the joining to Canada of parts of Maine and New York. Yet both these latter sections were the property of the states, and not of the nation, and therefore it is difficult to see how any cession of them could have been made by treaty, should our necessities have compelled the acceptance of the terms. As yet we still possess territory owned by the nation, which might be legally alienated, but the time is not far distant when all the territories will be states. Presumptively, the nation could then only meet a demand for territorial cession by allowing the foreign country to take possession of the territory, leaving it solely to the state to protect itself, much as New England was left to secure itself in the War of 1812. Two significant facts are the clause in the articles of Confederation "that no state shall be deprived of territory for the benefit of the United States," which was omitted in the federal constitution, and the agreement in the Ashburton treaty of 1842 respecting the disputed boundary between British America and Maine, by which land claimed by the latter was confirmed to Great Britain, and Maine was pecuniarily indemnified for the loss.—EDITOR.

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gress have been led by it. With great propriety, therefore, has the new system supplied the defect. The general precaution that no new States shall be formed, without the concurrence of the federal authority and that of the States concerned, is consonant to the principles which ought to govern such transactions. The particular precaution against the erection of new States by the partition of a State without its consent quiets the jealousy of the larger States; as that of the smaller is quieted by a like precaution against a junction of States without their consent.[1]

5. "To dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, with a proviso, that nothing in the Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

This is a power of very great importance, and required by considerations similar to those which show the propriety of the former. The proviso annexed is proper in itself, and was probably rendered absolutely necessary by jealousies and questions concerning the Western territory sufficiently known to the public.

6. "To guarantee to every State in the Union a

[1] In 1799 Alexander Hamilton, in outlining what he thought the Federalist policy should be, wrote: "Happy would it be if a clause could be added to the constitution, enabling Congress, on the application of any considerable portion of a state containing not less than a hundred thousand persons, to erect it into a separate state, on the condition of fixing the quota of contributions which it shall make towards antecedent debts, if any there shall be, reserving to Congress the authority to levy within such state the taxes necessary to the payment of such quota, in case of neglect on the part of the state. The subdivision of the great states is indispensable to the security of the general government, and with it of the Union. Great states will always feel a rivalship with the common head, will often be supposed to machinate against it, and in certain situations will be able to do it with decisive effect. The subdivision of such states ought to be a cardinal point in the federal policy; and small states are doubtless adapted to the purposes of local regulation and to the preservation of the republican spirit. This suggestion, however, is merely thrown out for consideration. It is feared that it would be inexpedient and even dangerous to propose, at this time, an amendment of the kind."—EDITOR.

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republican form of government; to protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence."

In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other: and the greater right to insist that the forms of government under which the compact was entered into should be *substantially* maintained. But a right implies a remedy; and where else could the remedy be deposited than where it is deposited by the Constitution? Governments of dissimilar principles and forms have been found less adapted to a federal coalition of any sort than those of a kindred nature. "As the confederate republic of Germany," says Montesquieu, "consists of free cities and petty states, subject to different princes, experience shows us that it is more imperfect than that of Holland and Switzerland." "Greece was undone," he adds, "as soon as the king of Macedon obtained a seat among the Amphictyons." In the latter case, no doubt, the disproportionate force, as well as the monarchical form, of the new confederate, had its share of influence on the events. It may possibly be asked, what need there could be of such a precaution, and whether it may not become a pretext for alterations in the State governments, without the concurrence of the States themselves. These questions admit of ready answers. If the interposition of the general government should not be needed, the provision for such an event will be a harmless superfluity only in the Constitution. But who can say what experiments may be produced by the caprice of particular States, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers? To the second question it may be

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answered that, if the general government should interpose by virtue of this constitutional authority, it will be of course bound to pursue the authority. But the authority extends no further than to a *guaranty* of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is that they shall not exchange republican for anti-republican constitutions; a restriction which, it is presumed, will hardly be considered as a grievance.

A protection against invasion is due from every society to the parts composing it. The latitude of the expression here used seems to secure each State, not only against foreign hostility, but against ambitious or vindictive enterprises of its more powerful neighbors. The history both of ancient and modern confederacies proves that the weaker members of the union ought not to be insensible to the policy of this article.

Protection against domestic violence is added with equal propriety. It has been remarked that, even among the Swiss cantons, which, properly speaking, are not under one government, provision is made for this object; and the history of that league informs us that mutual aid is frequently claimed and afforded; and as well by the most democratic as the other cantons. A recent and well-known event among ourselves has warned us to be prepared for emergencies of a like nature.[1]

At first view, it might seem not to square with the republican theory to suppose either that a majority have not the right, or that a minority will have the force to subvert a government; and consequently, that the federal interposition can never be required but when it would

[1] Shays's Rebellion.—EDITOR.

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be improper. But theoretic reasoning, in this as in most other cases, must be qualified by the lessons of practice. Why may not illicit combinations for purposes of violence be formed as well by a majority of a State, especially a small State, as by a majority of a county, or a district of the same State, and if the authority of the State ought, in the latter case, to protect the local magistracy, ought not the federal authority, in the former, to support the State authority? Besides, there are certain parts of the State constitutions which are so interwoven with the federal Constitution that a violent blow cannot be given to the one without communicating the wound to the other. Insurrections in a State will rarely induce a federal interposition, unless the number concerned in them bear some proportion to the friends of government. It will be much better that the violence in such cases should be repressed by the superintending power than that the majority should be left to maintain their cause by a bloody and obstinate contest. The existence of a right to interpose will generally prevent the necessity of exerting it.

Is it true that force and right are necessarily on the same side in republican governments? May not the minor party possess such a superiority of pecuniary resources, of military talents and experience, or of secret succors from foreign powers, as will render it superior also in an appeal to the sword? May not a more compact and advantageous position turn the scale on the same side, against a superior number so situated as to be less capable of a prompt and collected exertion of its strength? Nothing can be more chimerical than to imagine that, in a trial of actual force, victory may be calculated by the rules which prevail in a census of the inhabitants, or which determine the event of an election! May it not happen, in fine, that the minority of CITIZENS may become a majority of PERSONS, by the accession of alien residents, of a casual concourse of adventurers, or of those whom the constitution of the State has not admitted to the rights of suffrage? I take no notice of

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an unhappy species of population abounding in some of the States, who, during the calm of regular government, are sunk below the level of men; but who, in the tempestuous scenes of civil violence, may emerge into the human character and give a superiority of strength to any party with which they may associate themselves.[1]

In cases where it may be doubtful on which side justice lies, what better umpires could be desired by two violent factions, flying to arms and tearing a State to pieces, than the representatives of confederate States, not heated by the local flame? To the impartiality of judges, they would unite the affection of friends. Happy would it be if such a remedy for its infirmities could be enjoyed by all free governments; if a project equally effectual could be established for the universal peace of mankind!

Should it be asked, what is to be the redress for an insurrection pervading all the States, and comprising a superiority of the entire force, though not a constitutional right? the answer must be that such a case, as it would be without the compass of human remedies, so it is fortunately not within the compass of human probability; and that it is a sufficient recommendation of the federal Constitution that it diminishes the risk of a calamity for which no possible constitution can provide a cure.

Among the advantages of a confederate republic enumerated by Montesquieu an important one is, "that should a popular insurrection happen in one of the States, the others are able to quell it. Should abuses creep into one part, they are reformed by those that remain sound."

7. "To consider all debts contracted, and engagements entered into, before the adoption of this Constitution, as being no less valid against the United States, under this Constitution, than under the Confederation."

This can only be considered as a declaratory proposition; and may have been inserted, among other reasons for the satisfaction of the foreign creditors of the United

[1] An allusion to the southern slaves.—EDITOR

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States, who cannot be strangers to the pretended doctrine that a change in the political form of civil society has the magical effect of dissolving its moral obligations.

Among the lesser criticisms which have been exercised on the Constitution, it has been remarked that the validity of engagements ought to have been asserted in favor of the United States as well as against them; and in the spirit which usually characterizes little critics, the omission has been transformed and magnified into a plot against the national rights. The authors of this discovery may be told, what few others need to be informed of, that, as engagements are in their nature reciprocal, an assertion of their validity on one side necessarily involves a validity on the other side; and that, as the article is merely declaratory, the establishment of the principle in one case is sufficient for every case. They may be further told that every constitution must limit its precautions to dangers that are not altogether imaginary; and that no real danger can exist that the government would DARE, with or even without this constitutional declaration before it, to remit the debts justly due to the public, on the pretext here condemned.

8. "To provide for amendments to be ratified by three-fourths of the States, under two exceptions only."

That useful alterations will be suggested by experience could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would render the Constitution too mutable, and that extreme difficulty which might perpetuate its discovered faults. It, moreover, equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side or on the other. The exception in favor of the equality of suffrage in the Senate was probably meant as a palladium to the residuary sovereignty of the States, implied and secured by that principle of representation in one branch of the

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legislature; and was probably insisted on by the States particularly attached to that equality. The other exception must have been admitted on the same considerations which produced the privilege defended by it.[1]

9. "The ratification of the convention of nine States shall be sufficient for the establishment of this Constitution between the States, ratifying the same."

This article speaks for itself. The express authority of the people alone could give due validity to the Constitution. To have required the unanimous ratification of the thirteen States would have subjected the essential interests of the whole to the caprice or corruption of a single member. It would have marked a want of foresight in the convention which our own experience would have rendered inexcusable.

Two questions of a very delicate nature present themselves on this occasion: 1. On what principle the Confederation, which stands in the solemn form of a compact among the States, can be superseded without the unanimous consent of the parties to it? 2. What relation is to subsist between the nine or more States ratifying the Constitution and the remaining few who do not become parties to it?

The first question is answered at once by recurring to the absolute necessity of the case: to the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed. PERHAPS, also, an answer may be found without searching beyond the principles of the compact itself. It has been heretofore noted among the defects of the Confederation that in many of the States it had received no higher sanction than a mere legislative ratification.[2] The principle of reciprocality seems to require

[1] A history of the various successful and unsuccessful attempts to amend the constitution will be found in the Appendix.—EDITOR.

[2] The lack of authority of the state legislatures to adopt the articles of confederation without submitting them to the people was one of

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that its obligation on the other States should be reduced to the same standard. A compact between independent sovereigns, founded on ordinary acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties. It is an established doctrine on the subject of treaties, that all the articles are mutually conditions of each other; that a breach of any one article is a breach of the whole treaty; and that a breach, committed by either of the parties, absolves the others, and authorizes them, if they please, to pronounce the compact violated and void. Should it unhappily be necessary to appeal to these delicate truths for a justification for dispensing with the consent of particular States to a dissolution of the federal pact, will not the complaining parties find it a difficult task to answer the MULTIPLIED and IMPORTANT infractions with which they may be confronted? The time has been when it was incumbent on us all to veil the ideas which this paragraph exhibits. The scene is now changed, and with it the part which the same motives dictate.

The second question is not less delicate; and the flattering prospect of its being merely hypothetical forbids an over-curious discussion of it. It is one of those cases which must be left to provide for itself. In general it may be observed that, although no political relation can subsist between the assenting and dissenting States, yet the moral relations will remain uncanceled. The claims of justice, both on one side and on the other, will be in force and must be fulfilled; the rights of humanity must in all cases be duly and mutually respected; whilst considerations of a common interest, and, above all, the remembrance of the endearing scenes which are past,

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the fundamental objections raised among the thoughtful men of the time. And so general was the recognition that a state legislature could not adopt or terminate the later federal compact, that South Carolina in 1832 and 1860, and all the other southern states which seceded, declared secession through conventions of the people; thus very effectually disproving what they were then trying to maintain, that the state governments were sovereign.—EDITOR.

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and the anticipation of a speedy triumph over the obstacles to reunion, will, it is hoped, not urge in vain MODERATION on one side, and PRUDENCE on the other.[1]

PUBLIUS.

No. 44 [43]. (*New York Packet*, January 25, 1788.) Madison.

RESTRICTIVE POWERS ON THE STATES.

Forbidding the establishment of treaties and alliances between the states—Issues of letters of marque—Coinage of money—Issue of bills of credit—Establishment of any legal tender other than gold and silver—Bills of attainder—Ex post facto laws—Laws impairing contracts—Titles of nobility—Imposition of duties on exports and imports—The power to make all laws necessary and proper to carry the preceding powers into execution—Necessity of such a power—Prohibition of the exercise of any powers not expressly delegated—Positive enumeration of general powers delegated—Negative enumeration by specification of reserved powers and by silence—Remedy for an abuse of this general power—The supremacy of the constitution, the constitutional laws, and treaties—Oath of state and federal officers to support constitution—No part of the powers delegated unnecessary or improper.

To the People of the State of New York:

A *fifth* class of provisions in favor of the federal authority consists of the following restrictions on the authority of the several States:

1. "No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver a legal tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility."

The prohibition against treaties, alliances, and con-

[1] North Carolina and Rhode Island did not adopt the federal constitution until the new government had been some months in operation and were therefore, technically speaking, for some time out of the Union. The persistence of Rhode Island in her refusal to accede actually led to discussion in Massachusetts and Connecticut as to whether that "example of turpitude" should not be dismembered and joined to those two states.—EDITOR.

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federations makes a part of the existing articles of Union; and for reasons which need no explanation, is copied into the new Constitution. The prohibition of letters of marque is another part of the old system, but is somewhat extended in the new. According to the former, letters of marque could be granted by the States after a declaration of war; according to the latter, these licenses must be obtained, as well during war as previous to its declaration, from the government of the United States. This alteration is fully justified by the advantage of uniformity in all points which relate to foreign powers; and of immediate responsibility to the nation in all those for whose conduct the nation itself is to be responsible.

The right of coining money, which is here taken from the States, was left in their hands by the Confederation, as a concurrent right with that of Congress, under an exception in favor of the exclusive right of Congress to regulate the alloy and value. In this instance, also, the new provision is an improvement on the old. Whilst the alloy and value depended on the general authority, a right of coinage in the particular States could have no other effect than to multiply expensive mints and diversify the forms and weights of the circulating pieces. The latter inconveniency defeats one purpose for which the power was originally submitted to the federal head; and as far as the former might prevent an inconvenient remittance of gold and silver to the central mint for recoinage, the end can be as well attained by local mints established under the general authority.

The extension of the prohibition to bills of credit must give pleasure to every citizen, in proportion to his love of justice and his knowledge of the true springs of public prosperity. The loss which America has sustained since the peace, from the pestilent effects of paper money on the necessary confidence between man and man, on the necessary confidence in the public councils, on the industry and morals of the people, and on the character of republican government, constitutes an enormous debt against the States chargeable with this unadvised measure,

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which must long remain unsatisfied; or rather an accumulation of guilt, which can be expiated no otherwise than by a voluntary sacrifice on the altar of justice of the power which has been the instrument of it. In addition to these persuasive considerations, it may be observed that the same reasons which show the necessity of denying to the States the power of regulating coin prove with equal force that they ought not to be at liberty to substitute a paper medium in the place of coin. Had every State a right to regulate the value of its coin, there might be as many different currencies as States, and thus the intercourse among them would be impeded; retrospective alterations in its value might be made, and thus the citizens of other States be injured, and animosities be kindled among the States themselves. The subjects of foreign powers might suffer from the same cause, and hence the Union be discredited and embroiled by the indiscretion of a single member. No one of these mischiefs is less incident to a power in the States to emit paper money than to coin gold or silver. The power to make anything but gold and silver a tender in payment of debts is withdrawn from the States, on the same principle with that of issuing a paper currency. [1]

Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived if they have not, in so doing, as faithfully consulted the

[1] See Bancroft's "Plea for the Constitution" for a history of bills of credit.—EDITOR.

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genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society. The prohibition with respect to titles of nobility is copied from the articles of Confederation, and needs no comment.

2. "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress. No State shall, without the consent of Congress, lay any duty on tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war unless actually invaded, or in such imminent danger as will not admit of delay."

The restraint on the power of the States over imports and exports is enforced by all the arguments which prove the necessity of submitting the regulation of trade to the federal councils. It is needless, therefore, to remark further on this head than that the manner in which the restraint is qualified seems well calculated at once to secure to the States a reasonable discretion in providing

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for the conveniency of their imports and exports, and to the United States a reasonable check against the abuse of this discretion. The remaining particulars of this clause fall within reasonings which are either so obvious, or have been so fully developed, that they may be passed over without remark.

The *sixth* and last class consists of the several powers and provisions by which efficacy is given to all the rest.

1. Of these the first is the "power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

Few parts of the Constitution have been assailed with more intemperance than this; yet, on a fair investigation of it, no part can appear more completely invulnerable. Without the *substance* of this power, the whole Constitution would be a dead letter. Those who object to the article, therefore, as a part of the Constitution, can only mean that the *form* of the provision is improper. But have they considered whether a better form could have been substituted?

There are four other possible methods which the Constitution might have taken on this subject. They might have copied the second article of the existing Confederation, which would have prohibited the exercise of any power not *expressly* delegated; they might have attempted a positive enumeration of the powers comprehended under the general terms "necessary and proper"; they might have attempted a negative enumeration of them, by specifying the powers excepted from the general definition; they might have been altogether silent on the subject, leaving these necessary and proper powers to construction and inference.

Had the convention taken the first method of adopting the second article of Confederation, it is evident that the new Congress would be continually exposed, as their predecessors have been, to the alternative of construing the term "*expressly*" with so much rigor as to disarm

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the government of all real authority whatever, or with so much latitude as to destroy altogether the force of the restriction. It would be easy to show, if it were necessary, that no important power, delegated by the articles of Confederation, has been or can be executed by Congress, without recurring more or less to the doctrine of *construction* or *implication*. As the powers delegated under the new system are more extensive, the government which is to administer it would find itself still more distressed with the alternative of betraying the public interests by doing nothing, or of violating the Constitution by exercising powers indispensably necessary and proper, but, at the same time, not *expressly* granted.

Had the convention attempted a positive enumeration of the powers necessary and proper for carrying their other powers into effect, the attempt would have involved a complete digest of laws on every subject to which the Constitution relates; accommodated, too, not only to the existing state of things, but to all the possible changes which futurity may produce; for in every new application of a general power, the *particular powers*, which are the means of attaining the *object* of the general power, must always necessarily vary with that object, and be often properly varied while the object remains the same.

Had they attempted to enumerate the particular powers or means not necessary or proper for carrying the general powers into execution, the task would have been no less chimerical; and would have been liable to this further objection, that every defect in the enumeration would have been equivalent to a positive grant of authority. If, to avoid this consequence, they had attempted a partial enumeration of the exceptions, and described the residue by the general terms, *not necessary or proper*, it must have happened that the enumeration would comprehend a few of the excepted powers only; that these would be such as would be least likely to be assumed or tolerated, because the enumeration would of course select such as would be least necessary or

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proper; and that the unnecessary and improper powers included in the residuum would be less forcibly excepted than if no partial enumeration had been made.

Had the Constitution been silent on this head, there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government, by unavoidable implication. No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included. Had this last method, therefore, been pursued by the convention, every objection now urged against their plan would remain in all its plausibility; and the real inconveniency would be incurred of not removing a pretext which may be seized on critical occasions for drawing into question the essential powers of the Union.

If it be asked what is to be the consequence, in case the Congress shall misconstrue this part of the Constitution, and exercise powers not warranted by its true meaning, I answer, the same as if they should misconstrue or enlarge any other power vested in them; as if the general power had been reduced to particulars, and any one of these were to be violated; the same, in short, as if the State legislatures should violate their respective constitutional authorities. In the first instance, the success of the usurpation will depend on the executive and judiciary departments which are to expound and give effect to the legislative acts; and in the last resort a remedy must be obtained from the people, who can, by the election of more faithful representatives, annul the acts of the usurpers. The truth is that this ultimate redress may be more confided in against unconstitutional acts of the federal than of the State legislatures, for this plain reason, that as every such act of the former will be an invasion of the rights of the latter, these will be ever ready to mark the innovation, to sound the alarm to the people, and to exert their local influence in effecting a

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change of federal representatives.[1] There being no such intermediate body between the State legislatures and the people interested in watching the conduct of the former, violations of the State constitutions are more likely to remain unnoticed and unredressed.

2. "This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

The indiscreet zeal of the adversaries to the Constitution has betrayed them into an attack on this part of it also, without which it would have been evidently and radically defective. To be fully sensible of this, we need only suppose for a moment that the supremacy of the State constitutions had been left complete by a saving clause in their favor.

See No. 33.

In the first place, as these constitutions invest the State legislatures with absolute sovereignty, in all cases not excepted by the existing articles of Confederation, all the authorities contained in the proposed Constitution, so far as they exceed those enumerated in the Confederation, would have been annulled, and the new Congress would have been reduced to the same impotent condition with their predecessors.

In the next place, as the constitutions of some of the States do not even expressly and fully recognize the existing powers of the Confederacy, an express saving of the supremacy of the former would, in such States, have brought into question every power contained in the proposed Constitution.

In the third place, as the constitutions of the States differ much from each other, it might happen that a treaty or national law, of great and equal importance to

[1] Here Madison proposed the very course pursued by the Virginia and Kentucky legislatures in 1798–99, and by the Connecticut and Massachusetts legislatures in 1812–14.—EDITOR.

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the States, would interfere with some and not with other constitutions, and would consequently be valid in some of the States, at the same time that it would have no effect in others.

In fine, the world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members.

3. "The Senators and Representatives, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and the several States, shall be bound by oath or affirmation to support this Constitution."

It has been asked why it was thought necessary that the State magistracy should be bound to support the federal Constitution, and unnecessary that a like oath should be imposed on the officers of the United States, in favor of the State constitutions.

Several reasons might be assigned for the distinction. I content myself with one, which is obvious and conclusive. The members of the federal government will have no agency in carrying the State constitutions into effect. The members and officers of the State governments, on the contrary, will have an essential agency in giving effect to the federal Constitution. The election of the President and Senate will depend, in all cases, on the legislatures of the several States. And the election of the House of Representatives will equally depend on the same authority in the first instance; and will, probably, forever be conducted by the officers, and according to the laws, of the States.

4. Among the provisions for giving efficacy to the federal powers might be added those which belong to the executive and judiciary departments; but as these are reserved for particular examination in another place, I pass them over in this.

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We have now reviewed, in detail, all the articles composing the sum or quantity of power delegated by the proposed Constitution to the federal government, and are brought to this undeniable conclusion, that no part of the power is unnecessary or improper for accomplishing the necessary objects of the Union. The question, therefore, whether this amount of power shall be granted or not, resolves itself into another question, whether or not a government commensurate to the exigencies of the Union shall be established; or, in other words, whether the Union itself shall be preserved. PUBLIUS.

No. 45 [44]. (*New York Packet*, January 25, 1788.) Madison.

THE WHOLE MASS OF NATIONAL POWER IN RELATION TO THE STATE GOVERNMENTS.

The new constitution not dangerous to the state governments—Tendency in confederation is to weaken the central power—State governments will have more influence among the people—State governments are essential parts of the federal government—Officers of the United States are less numerous than those of the states—Reserved powers are relatively greater than those delegated—Proposed change consists less in giving new than in strengthening old powers.

To the People of the State of New York:

Having shown that no one of the powers transferred to the federal government is unnecessary or improper, the next question to be considered is whether the whole mass of them will be dangerous to the portion of authority left in the several States.

The adversaries to the plan of the convention, instead of considering in the first place what degree of power was absolutely necessary for the purposes of the federal government, have exhausted themselves in a secondary inquiry into the possible consequences of the proposed degree of power to the governments of the particular States. But if the Union, as has been shown, be essen-

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tial to the security of the people of America against foreign danger; if it be essential to their security against contentions and wars among the different States; if it be essential to guard them against those violent and oppressive factions which embitter the blessings of liberty, and against those military establishments which must gradually poison its very fountain; if, in a word, the Union be essential to the happiness of the people of America, is it not preposterous to urge as an objection to a government, without which the objects of the Union cannot be attained, that such a government may derogate from the importance of the governments of the individual States? Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the government of the individual States, that particular municipal establishments, might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty? We have heard of the impious doctrine in the Old World that the people were made for kings, not kings for the people. Is the same doctrine to be revived in the New, in another shape—that the solid happiness of the people is to be sacrificed to the views of political institutions of a different form? It is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object. Were the plan of the convention adverse to the public happiness, my voice would be, Reject the plan. Were the Union itself inconsistent with the public happiness, it would be, Abolish the Union. In like manner, as far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter. How far the sacrifice is necessary has been shown.

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How far the unsacrificed residue will be endangered is the question before us.

Several important considerations have been touched in the course of these papers, which discountenance the supposition that the operation of the federal government will by degrees prove fatal to the State governments. The more I revolve the subject, the more fully I am persuaded that the balance is much more likely to be disturbed by the preponderancy of the last than of the first scale.[1]

We have seen, in all the examples of ancient and modern confederacies, the strongest tendency continually betraying itself in the members to despoil the general government of its authorities, with a very ineffectual capacity in the latter to defend itself against the encroachments. Although, in most of these examples, the system has been so dissimilar from that under consideration as greatly to weaken any inference concerning the latter from the fate of the former, yet, as the States will retain, under the proposed Constitution, a very extensive portion of active sovereignty, the inference ought not to be wholly disregarded. In the Achæan league it is probable that the federal head had a degree and species of power which gave it a considerable likeness to the government framed by the convention. The Lycian Confederacy, as far as its principles and form are transmitted, must have borne a still greater analogy to it. Yet history does not inform us that either of them ever degenerated, or

See No. 37.

[1] As a matter of fact the balance between the states and the nation has been admirably maintained. While the national government has assumed many additional powers which the growth of communication has made it possible for it to enforce, yet relatively the state governments have come to be more important elements, as compared with the national government, than in 1800. This is owing chiefly to the circumstance that relations with foreign countries—the greatest function of the general government—have become far less vital, with the growing tendency to peace; for such foreign relations as now exist are chiefly commercial, and by the practical destruction of American shipping have been reduced to little more than questions of tariffs. The importance of internal affairs, too, has declined with the curbing and extinction of the Indian and with the steady lessening of public territory. Certain developments have, of course, greatly added to the national influence, such as the greater importance of the post office, the governmental control over railroads, the creation of national banks and the power to say what is money, the levying of protective tariff and the granting of bounties, the policy of internal improvement, and several other material factors. But with the development of national functions has come a greatly increased importance

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tended to degenerate, into one consolidated government. On the contrary, we know that the ruin of one of them proceeded from the incapacity of the federal authority to prevent the dissensions, and finally the disunion, of the subordinate authorities. These cases are the more worthy of our attention, as the external causes by which the component parts were pressed together were much more numerous and powerful than in our case; and consequently less powerful ligaments within would be sufficient to bind the members to the head and to each other.

In the feudal system we have seen a similar propensity exemplified. Notwithstanding the want of proper sympathy in every instance between the local sovereigns and the people, and the sympathy in some instances between the general sovereign and the latter, it usually happened that the local sovereigns prevailed in the rivalship for encroachments. Had no external dangers enforced internal harmony and subordination, and particularly, had the local sovereigns possessed the affections of the people, the great kingdoms in Europe would at this time consist of as many independent princes as there were formerly feudatory barons.

The State governments will have the advantage of the federal government, whether we compare them in respect to the immediate dependence of the one on the other; to the weight of personal influence which each side will possess; to the powers respectively vested in them; to the predilection and probable support of the people; to the disposition and faculty of resisting and frustrating the measures of each other.

The State governments may be regarded as constituent

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of the state governments. The mere power to charter cities and corporations, which now plays such a vital part in the life of every citizen, probably quite balances all the additional powers hitherto assumed by the general government. Furthermore, the states have secured complete control over public education, have developed a militia far out of proportion to the regular army, and have gained enormously in the power of taxation, through such means as sales of public rights, and inheritance and income taxes. In the daily life of the citizen, the creation and control of the machinery for supplying him with food, water, gas, transportation, and education; for aiding him in sickness, in poverty, or in insanity; and for protecting him from violence and fire, from disease, from vice, and from fraud, all vest—with exceptions scarcely worth a mention—in the state governments, or in their creations—the counties and municipalities. As a result it is probable that the direct reliance of the citizen on the national government, as compared with that of his state, has distinctly lessened rather than increased, in the last hundred years.—EDITOR.

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and essential parts of the federal government; whilst the latter is nowise essential to the operation or organization of the former. Without the intervention of the State legislatures, the President of the United States cannot be elected at all.[1] They must in all cases have a great share in his appointment, and will, perhaps, in most cases, of themselves determine it. The Senate will be elected absolutely and exclusively by the State legislatures. Even the House of Representatives, though drawn immediately from the people, will be chosen very much under the influence of that class of men whose influence over the people obtains for themselves an election into the State legislatures. Thus, each of the principal branches of the federal government will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence which is much more likely to beget a disposition too obsequious than too overbearing towards them. On the other side, the component parts of the State governments will in no instance be indebted for their appointment to the direct agency of the federal government, and very little, if at all, to the local influence of its members.

The number of individuals employed under the Constitution of the United States will be much smaller than the number employed under the particular States. There will consequently be less of personal influence on the side of the former than of the latter. The members of the legislative, executive, and judiciary departments of thirteen and more States, the justices of peace, officers of militia, ministerial officers of justice, with all the county, corporation, and town officers, for three millions and more of people, intermixed, and having particular acquaintance with every class and circle of people, must

[1] In the first forty years the presidential electors were usually chosen by the state legislatures, and South Carolina even maintained this system till 1868. In 1828 a number of the states chose their electors by means of popular votes, a system which has since become universal, and which has thus excluded the legislatures from all participation in the election of the President.—EDITOR.

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exceed beyond all proportion, both in number and in influence, those of every description who will be employed in the administration of the federal system. Compare the members of the three great departments of the thirteen States, excluding from the judiciary department the justices of peace, with the members of the corresponding departments of the single government of the Union; compare the militia officers of three millions of people with the military and marine officers of any establishment which is within the compass of probability, or, I may add, of possibility, and, in this view alone, we may pronounce the advantage of the States to be decisive. If the federal government is to have collectors of revenue, the State governments will have theirs also. And as those of the former will be principally on the sea-coast, and not very numerous, whilst those of the latter will be spread over the face of the country, and will be very numerous, the advantage in this view also lies on the same side. It is true that the Confederacy is to possess, and may exercise, the power of collecting internal as well as external taxes throughout the States; but it is probable that this power will not be resorted to, except for supplemental purposes of revenue; that an option will then be given to the States to supply their quotas by previous collections of their own; and that the eventual collection, under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States. Indeed it is extremely probable that in other instances, particularly in the organization of the judicial power, the officers of the States will be clothed with the correspondent authority of the Union. Should it happen, however, that separate collectors of internal revenue should be appointed under the federal government, the influence of the whole number would not bear a comparison with that of the multitude of State officers in the opposite scale. Within every district to which a federal collector would be allotted, there would not be less than thirty or forty, or even more, officers of different descriptions, and many of them per-

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sons of character and weight, whose influence would lie on the side of the State.

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The operations of the federal government will be most extensive and important in times of war and danger; those of the State governments, in times of peace and security. As the former periods will probably bear a small proportion to the latter, the State governments will here enjoy another advantage over the federal government. The more adequate, indeed, the federal powers may be rendered to the national defense, the less frequent will be those scenes of danger which might favor their ascendency over the governments of the particular States.

If the new Constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of NEW POWERS to the Union than in the invigoration of its ORIGINAL POWERS. The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained. The powers relating to war and peace, armies and fleets, treaties and finance, with the other more considerable powers, are all vested in the existing Congress by the articles of Confederation. The proposed change does not enlarge these powers; it only substitutes a more effectual mode of administering them. The change relating to taxation may be regarded as the most important; and yet the present Congress have as complete authority to REQUIRE of the States indefinite supplies of money for the common defense and general welfare as the future Congress will have to require them of individual citizens; and the latter will be

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no more bound than the States themselves have been to pay the quotas respectively taxed on them. Had the States complied punctually with the articles of Confederation, or could their compliance have been enforced by as peaceable means as may be used with success towards single persons, our past experience is very far from countenancing an opinion that the State governments would have lost their constitutional powers and have gradually undergone an entire consolidation. To maintain that such an event would have ensued would be to say at once that the existence of the State governments is incompatible with any system whatever that accomplishes the essential purposes of the Union.

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No. 46 [45]. (*New York Packet*, January 29, 1788.) Madison.

THE RELATIVE INFLUENCE OF THE FEDERAL AND THE STATE GOVERNMENTS WITH THE PEOPLE.

Federal and state governments only different agents of the same constituents—The first attachment of the people will be to the state governments—Popularity will come to the federal government only if it is better administered—Objections on score of federal military power answered—Concluding remarks on the proposition that the powers of the Union will be dangerous to the state governments.

To the People of the State of New York:

Resuming the subject of the last paper, I proceed to inquire whether the federal government or the State governments will have the advantage with regard to the predilection and support of the people. Notwithstanding the different modes in which they are appointed, we must consider both of them as substantially dependent on the great body of the citizens of the United States. I assume this position here as it respects the first, reserving the proofs for another place. The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes. The adversaries of the Constitution seem to have lost sight of the people

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altogether in their reasonings on this subject; and to have viewed these different establishments not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other. These gentlemen must here be reminded of their error. They must be told that the ultimate authority, wherever the derivative may be found, resides in the people alone, and that it will not depend merely on the comparative ambition or address of the different governments, whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other. Truth, no less than decency, requires that the event in every case should be supposed to depend on the sentiments and sanction of their common constituents.

Many considerations besides those suggested on a former occasion seem to place it beyond doubt that the first and most natural attachment of the people will be to the governments of their respective States. Into the administration of these a greater number of individuals will expect to rise. From the gift of these a greater number of offices and emoluments will flow. By the superintending care of these, all the more domestic and personal interests of the people will be regulated and provided for. With the affairs of these, the people will be more familiarly and minutely conversant. And with the members of these, will a greater proportion of the people have the ties of personal acquaintance and friendship, and of family and party attachments; on the side of these, therefore, the popular bias may well be expected most strongly to incline.

Experience speaks the same language in this case. The federal administration, though hitherto very defective in comparison with what may be hoped under a better system, had, during the war, and particularly whilst the independent fund of paper emissions was in credit, an activity and importance as great as it can well have in any future circumstances whatever. It was engaged, too, in a course of measures which had for

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their object the protection of everything that was dear, and the acquisition of everything that could be desirable to the people at large. It was nevertheless invariably found, after the transient enthusiasm for the early Congresses was over, that the attention and attachment of the people were turned anew to their own particular governments; that the federal council was at no time the idol of popular favor; and that opposition to proposed enlargements of its powers and importance was the side usually taken by the men who wished to build their political consequence on the prepossessions of their fellow-citizens.

If, therefore, as has been elsewhere remarked, the people should in future become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proofs of a better administration as will overcome all their antecedent propensities.[1] And in that case the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due; but even in that case the State governments could have little to apprehend, because it is only within a certain sphere that the federal power can, in the nature of things, be advantageously administered.

See No. 49.

The remaining points on which I propose to compare the federal and State governments are the disposition and the faculty they may respectively possess, to resist and frustrate the measures of each other.

It has been already proved that the members of the federal will be more dependent on the members of the State governments than the latter will be on the former. It has appeared, also, that the prepossessions of the people, on whom both will depend, will be more on the

[1] Such has been the history of the steady growth of respect for the national government, and it illustrates Bagehot's principle that "every constitution must first *gain* authority, and then *use* authority; it must first win the loyalty and confidence of mankind, and then employ that homage in the work of government."—EDITOR.

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side of the State governments than of the federal government. So far as the disposition of each towards the other may be influenced by these causes, the State governments must clearly have the advantage. But in a distinct and very important point of view, the advantage will lie on the same side. The prepossessions, which the members themselves will carry into the federal government, will generally be favorable to the States; whilst it will rarely happen that the members of the State governments will carry into the public councils a bias in favor of the general government. A local spirit will infallibly prevail much more in the members of Congress than a national spirit will prevail in the legislatures of the particular States.[1] Everyone knows that a great proportion of the errors committed by the State legislatures proceeds from the disposition of the members to sacrifice the comprehensive and permanent interest of the State to the particular and separate views of the counties or districts in which they reside. And if they do not sufficiently enlarge their policy to embrace the collective welfare of their particular State, how can it be imagined that they will make the aggregate prosperity of the Union, and the dignity and respectability of its government, the objects of their affections and consultations? For the same reason that the members of the State legislatures will be unlikely to attach themselves sufficiently to national objects, the members of the

[1] This has been shown in all sectional controversies such as the slavery, tariff, Indian, coinage, and other issues. And, in a smaller sense, in every question of internal improvement the same spirit is manifested; each member of the legislative body sinking all thought of national good in the attempt to get "something" for his own immediate district or state. Both the River and Harbor bill and the bill appropriating money for public buildings have come to be vast "dickers," in which each representative or senator secures "something" for his constituents, by promising his vote to his fellow-members for the appropriations for their localities. Much of the jobbery could perhaps be remedied by a power granted to the President to veto separate items of a bill, instead of requiring him to veto or approve the bill as a whole. Many of the appropriations are disapproved by the majority of Congress, and are only put in to secure enough votes to pass the measure, consequently the vetoing of separate items would rarely result in attempts to repass them.—EDITOR.

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federal legislature will be likely to attach themselves too much to local objects. The States will be to the latter what counties and towns are to the former. Measures will too often be decided according to their probable effect, not on the national prosperity and happiness, but on the prejudices, interests, and pursuits of the governments and people of the individual States. What is the spirit that has in general characterized the proceedings of Congress? A perusal of their journals, as well as the candid acknowledgments of such as have had a seat in that assembly, will inform us that the members have but too frequently displayed the character rather of partisans of their respective States than of impartial guardians of a common interest; that where on one occasion improper sacrifices have been made of local considerations to the aggrandizement of the federal government, the great interests of the nation have suffered on a hundred from an undue attention to the local prejudices, interests, and views of the particular States. I mean not by these reflections to insinuate that the new federal government will not embrace a more enlarged plan of policy than the existing government may have pursued; much less, that its views will be as confined as those of the State legislatures; but only that it will partake sufficiently of the spirit of both to be disinclined to invade the rights of the individual States or the prerogatives of their governments. The motives on the part of the State governments to augment their prerogatives, by defalcations from the federal government, will be overruled by no reciprocal predispositions in the members.

Were it admitted, however, that the federal government may feel an equal disposition with the State governments to extend its power beyond the due limits, the latter would still have the advantage in the means of defeating such encroachments. If an act of a particular State, though unfriendly to the national government, be generally popular in that State, and should not too grossly violate the oaths of the State officers, it is executed immediately and, of course, by means on the spot

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and depending on the State alone. The opposition of the federal government, or the interposition of federal officers, would but inflame the zeal of all parties on the side of the State, and the evil could not be prevented or repaired, if at all, without the employment of means which must always be resorted to with reluctance and difficulty. On the other hand, should an unwarrantable measure of the federal government be unpopular in particular States, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand. The disquietude of the people; their repugnance and, perhaps, refusal to co-operate with the officers of the Union; the frowns of the executive magistracy of the State; the embarrassments created by legislative devices, which would often be added on such occasions, would oppose, in any State, difficulties not to be despised; would form, in a large State, very serious impediments; and, where the sentiments of several adjoining States happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter.

But ambitious encroachments of the federal government on the authority of the State governments would not excite the opposition of a single State or of a few States only. They would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened.[1] Plans of resistance

[1] In every attempt to oppose actively the state governments to the national government this has been the method, and probably nothing better proves the underlying sense of the true nationality of the Union, over and apart from any constitutional compact, than the fact that the leaders of state sovereignty have always appealed for support to the other states, or in reality to the majority of the people or nation, in their endeavors to override the acts of the federal government. The Virginia and Kentucky resolutions were in reality nothing but a request to the "co-states" for support. The Hartford convention ended in a proposition to amend the constitution, which was but a way of asking the other states to aid New England in its opposition to the general government. The South Carolina convention of 1832 issued an address to the "people" of the states, affirming that in this "crisis" those states cannot "hesitate in acceding to this arrangement." Most illustrative of all, however, was the appeal

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would be concerted. One spirit would animate and conduct the whole. The same combinations, in short, would result from an apprehension of the federal as was produced by the dread of a foreign yoke; and unless the projected innovations should be voluntarily renounced, the same appeal to a trial of force would be made in the one case as was made in the other. But what degree of madness could ever drive the federal government to such an extremity? In the contest with Great Britain, one part of the empire was employed against the other. The more numerous part invaded the rights of the less numerous part. The attempt was unjust and unwise; but it was not in speculation absolutely chimerical. But what would be the contest in the case we are supposing? Who would be the parties? A few representatives of the people would be opposed to the people themselves; or rather one set of representatives would be contending against thirteen sets of representatives, with the whole body of their common constituents on the side of the latter.

The only refuge left for those who prophesy the downfall of the State governments is the visionary supposition that the federal government may previously accumulate a military force for the projects of ambition. The reasonings contained in these papers must have been employed to little purpose indeed, if it could be necessary now to disprove the reality of this danger. That the people and the States should, for a sufficient period of time, elect an uninterrupted succession of men ready to betray both; that the traitors should, throughout this period, uniformly and sys-

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of South Carolina, in 1861, by an address of its convention to "the people of the slave-holding states," in which it was announced that "South Carolina desires no destiny separate from yours," and asking them to "join us in forming a confederacy of slave-holding states." That a state which had just asserted its existence as a free and sovereign country should at once ask to be made part of another implied as little true sense of the essence of nationality as if the thirteen colonies, after declaring independence in 1776, had petitioned to be united to France or Spain. In the whole history of the United States, a genuine effort to create an actual sovereignty in statehood, which could absolutely disregard the will of the co-states, was never once attempted. Yet without absolute independence from each and every other state, state sovereignty was necessarily a pure fiction and nullity.—EDITOR.

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tematically pursue some fixed plan for the extension of the military establishment; that the governments and the people of the States should silently and patiently behold the gathering storm, and continue to supply the materials, until it should be prepared to burst on their own heads, must appear to everyone more like the incoherent dreams of a delirious jealousy, or the misjudged exaggerations of a counterfeit zeal, than like the sober apprehensions of genuine patriotism. Extravagant as the supposition is, let it, however, be made. Let a regular army fully equal to the resources of the country be formed, and let it be entirely at the devotion of the federal government; still it would not be going too far to say that the State governments, with the people on their side, would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried in any country, does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms. This proportion would not yield, in the United States, an army of more than twenty-five or thirty thousand men. To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the last successful resistance of this country against the British arms, will be most inclined to deny the possibility of it. Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition more insurmountable than any which a simple government of any form can admit of. Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms. And it is not certain that, with this aid alone, they would not be able to shake off their yokes. But were the people to possess the additional advantages of local governments chosen by themselves, who could collect the national will and direct the national force, and of officers appointed out of the militia, by these governments, and attached both to them and to the militia, it may be affirmed with the greatest assurance that the throne of every tyranny in Europe would be speedily

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overturned in spite of the legions which surround it. Let us not insult the free and gallant citizens of America with the suspicion that they would be less able to defend the rights of which they would be in actual possession than the debased subjects of arbitrary power would be to rescue theirs from the hands of their oppressors. Let us rather no longer insult them with the supposition that they can ever reduce themselves to the necessity of making the experiment, by a blind and tame submission to the long train of insidious measures which must precede and produce it.

The argument under the present head may be put into a very concise form, which appears altogether conclusive. Either the mode in which the federal government is to be constructed will render it sufficiently dependent on the people, or it will not. On the first supposition, it will be restrained by that dependence from forming schemes obnoxious to their constituents. On the other supposition, it will not possess the confidence of the people, and its schemes of usurpation will be easily defeated by the State governments, who will be supported by the people.

On summing up the considerations stated in this and the last paper, they seem to amount to the most convincing evidence that the powers proposed to be lodged in the federal government are as little formidable to those reserved to the individual States as they are indispensably necessary to accomplish the purposes of the Union; and that all those alarms which have been sounded, of a meditated and consequential annihilation of the State governments, must, on the most favorable interpretation, be ascribed to the chimerical fears of the authors of them.

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No. 47 [46]. (*Independent Journal*, January 30, 1788.) Madison.

SEPARATION OF THE DEPARTMENTS OF POWER.

The maxim that there should be separate and distinct departments considered—This maxim true—The new constitution does not violate it—The view of Montesquieu—The provisions of the various state constitutions on this point examined.

To the People of the State of New York:

Having reviewed the general form of the proposed government and the general mass of power allotted to it, I proceed to examine the particular structure of this government and the distribution of this mass of power among its constituent parts.

One of the principal objections inculcated by the more respectable adversaries to the Constitution is its supposed violation of the political maxim that the legislative, executive, and judiciary departments ought to be separate and distinct. In the structure of the federal government, no regard, it is said, seems to have been paid to this essential precaution in favor of liberty. The several departments of power are distributed and blended in such a manner as at once to destroy all symmetry and beauty of form, and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of other parts.

No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further argu-

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ments would be necessary to inspire a universal reprobation of the system. I persuade myself, however, that it will be made apparent to everyone that the charge cannot be supported, and that the maxim on which it relies has been totally misconceived and misapplied. In order to form correct ideas on this important subject, it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct.[1]

See No. 66.

The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind. Let us endeavor, in the first place, to ascertain his meaning on this point.

The British Constitution was to Montesquieu what Homer has been to the didactic writers on epic poetry. As the latter have considered the work of the immortal bard as the perfect model from which the principles and rules of the epic art were to be drawn, and by which all similar works were to be judged, so this great political

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[1] This theory of the division or separation of governmental powers, which has reached its highest expression in our constitution, was briefly noted by Aristotle, but was first seriously discussed by Locke in his "Treatise on Civil Government." It was Montesquieu, however, who first demonstrated that the separation of governmental powers into the legislative, executive, and judicial, with each so balanced as to be able to resist the encroachments of the other two, was indispensable to civil liberty, and from his "Esprit des Lois" the framers of American constitutions drew the principles embodied in the various state and federal constitutions. As Madison here observes, Montesquieu in his example of Great Britain as a model of such differentiation, constructed an ideal commonwealth rather than described the British government of his day. Bagehot, after making merry over this conception of the English constitution, asserts that the "efficient secret" of the system is the "close union, the nearly complete fusion, of the executive and legislative powers." ("The English Constitution," Works: iv. 52, 59.) See also Parker's, "The Three Powers of Government," New York: 1869; H. Davis's "American Constitutions; the Relations of the Three Departments as adjusted by a Century," Baltimore: 1885, and W. Bondy's "The Separation of Governmental Powers," New York: 1893.—EDITOR.

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critic appears to have viewed the Constitution of England as the standard, or to use his own expression, as the mirror of political liberty; and to have delivered, in the form of elementary truths, the several characteristic principles of that particular system. That we may be sure, then, not to mistake his meaning in this case, let us recur to the source from which the maxim was drawn.

On the slightest view of the British Constitution, we must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority. He alone has the prerogative of making treaties with foreign sovereigns, which, when made, have, under certain limitations, the force of legislative acts. All the members of the judiciary department are appointed by him, can be removed by him on the address of the two Houses of Parliament, and form, when he pleases to consult them, one of his constitutional councils. One branch of the legislative department forms also a great constitutional council to the executive chief, as, on another hand, it is the sole depositary of judicial power in cases of impeachment, and is invested with the supreme appellate jurisdiction in all other cases. The judges, again, are so far connected with the legislative department as often to attend and participate in its deliberations, though not admitted to a legislative vote.

From these facts, by which Montesquieu was guided, it may clearly be inferred that, in saying "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess

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the *whole* power of another department, the fundamental principles of a free constitution are subverted. This would have been the case in the constitution examined by him, if the king, who is the sole executive magistrate, had possessed also the complete legislative power, or the supreme administration of justice; or if the entire legislative body had possessed the supreme judiciary, or the supreme executive authority. This, however, is not among the vices of that constitution. The magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law; nor administer justice in person, though he has the appointment of those who do administer it. The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though they may be advised with by the legislative councils. The entire legislature can perform no judiciary act, though by the joint act of two of its branches the judges may be removed from their offices, and though one of its branches is possessed of the judicial power in the last resort. The entire legislature, again, can exercise no executive prerogative, though one of its branches constitutes the supreme executive magistracy, and another, on the impeachment of a third, can try and condemn all the subordinate officers in the executive department.

The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner." Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*." Some of these reasons are more fully explained in other passages; but briefly stated as they are

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here, they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author.

If we look into the constitutions of the several States we find that, notwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct. New Hampshire, whose constitution was the last formed, seems to have been fully aware of the impossibility and inexpediency of avoiding any mixture whatever of these departments, and has qualified the doctrine by declaring "that the legislative, executive, and judiciary powers ought to be kept as separate from, and independent of, each other *as the nature of a free government will admit; or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of unity and amity.*" Her constitution accordingly mixes these departments in several respects. The Senate, which is a branch of the legislative department, is also a judicial tribunal for the trial of impeachments. The President, who is the head of the executive department, is the presiding member also of the Senate; and, besides an equal vote in all cases, has a casting vote in case of a tie. The executive head is himself eventually elective every year by the legislative department, and his council is every year chosen by and from the members of the same department. Several of the officers of state are also appointed by the legislature. And the members of the judiciary department are appointed by the executive department.

The constitution of Massachusetts has observed a sufficient though less pointed caution, in expressing this fundamental article of liberty. It declares "that the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them." This declaration corresponds precisely with the doctrine of Montesquieu, as it has been explained, and is not in a single point violated by the plan of the convention. It goes no farther than to prohibit any one of the entire departments from exercising the powers of another department. In the very constitution to which it is prefixed, a partial mixture of powers has been admitted. The executive magistrate has a qualified negative on the legislative body, and the Senate, which is a part of the legislature, is a court of impeachment for members both of the executive and judiciary

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departments. The members of the judiciary department, again, are appointable by the executive department, and removable by the same authority on the address of the two legislative branches. Lastly, a number of the officers of government are annually appointed by the legislative department. As the appointment to offices, particularly executive offices, is in its nature an executive function, the compilers of the constitution have, in this last point at least, violated the rule established by themselves.

I pass over the constitutions of Rhode Island and Connecticut, because they were formed prior to the Revolution, and even before the principle under examination had become an object of political attention.[1]

The constitution of New York contains no declaration on this subject, but appears very clearly to have been framed with an eye to the danger of improperly blending the different departments. It gives, nevertheless, to the executive magistrate, a partial control over the legislative department; and, what is more, gives a like control to the judiciary department; and even blends the executive and the judiciary departments in the exercise of this control. In its council of appointment members of the legislative are associated with the executive authority, in the appointment of officers, both executive and judiciary. And its court for the trial of impeachments and correction of errors is to consist of one branch of the legislature and the principal members of the judiciary department.

The constitution of New Jersey has blended the different powers of government more than any of the preceding. The governor, who is the executive magistrate, is appointed by the legislature; is chancellor and ordinary, or surrogate of the State; is a member of the Supreme Court of Appeals, and president, with a casting vote, of one of the legislative branches. The same legislative branch acts again as executive council of the governor, and with him constitutes the Court of Appeals. The members of the judiciary department are appointed by the legislative department, and removable by one branch of it, on the impeachment of the other.

According to the constitution of Pennsylvania, the president, who is the head of the executive department, is annually elected by a vote in which the legislative department predominates. In conjunction with an executive council, he appoints the members of the judiciary department and forms a court of impeachment

[1] Rhode Island and Connecticut maintained the royal charters granted them in the seventeenth century.—EDITOR.

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for trial of all officers, judiciary as well as executive. The judges of the Supreme Court and justices of the peace seem also to be removable by the legislature; and the executive power of pardoning in certain cases, to be referred to the same department. The members of the executive council are made EX OFFICIO justices of peace throughout the State.

In Delaware the chief executive magistrate is annually elected by the legislative department. The speakers of the two legislative branches are vice presidents in the executive department. The executive chief, with six others, appointed, three by each of the legislative branches, constitutes the Supreme Court of Appeals; he is joined with the legislative department in the appointment of the other judges. Throughout the States it appears that the members of the legislature may at the same time be justices of the peace; in this State the members of one branch of it are EX OFFICIO justices of the peace; as are also the members of the executive council. The principal officers of the executive department are appointed by the legislative; and one branch of the latter forms a court of impeachments. All officers may be removed on address of the legislature.

Maryland has adopted the maxim in the most unqualified terms; declaring that the legislative, executive, and judicial powers of government ought to be forever separate and distinct from each other. Her constitution, notwithstanding, makes the executive magistrate appointable by the legislative department; and the members of the judiciary by the executive department.

The language of Virginia is still more pointed on this subject. Her constitution declares "that the legislative, executive, and judiciary departments shall be separate and distinct; so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them at the same time, except that the justices of county courts shall be eligible to either House of Assembly." Yet we find not only this express exception, with respect to the members of the inferior courts, but that the chief magistrate, with his executive council, are appointable by the legislature; that two members of the latter are triennially displaced at the pleasure of the legislature; and that all the principal offices, both executive and judiciary, are filled by the same department. The executive prerogative of pardon, also, is in one case vested in the legislative department.

The constitution of North Carolina, which declares "that the legislative, executive, and supreme judicial powers of government ought to be forever separate and distinct from each other," refers,

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at the same time, to the legislative department the appointment not only of the executive chief, but all the principal officers within both that and the judiciary department.

In South Carolina the constitution makes the executive magistracy eligible by the legislative department. It gives to the latter, also, the appointment of the members of the judiciary department, including even justices of the peace and sheriffs; and the appointment of officers in the executive department, down to captains in the army and navy of the State.

In the constitution of Georgia, where it is declared "that the legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other," we find that the executive department is to be filled by appointments of the legislature; and the executive prerogative of pardon to be finally exercised by the same authority. Even justices of the peace are to be appointed by the legislature.

In citing these cases, in which the legislative, executive, and judiciary departments have not been kept totally separate and distinct, I wish not to be regarded as an advocate for the particular organizations of the several State governments. I am fully aware that, among the many excellent principles which they exemplify, they carry strong marks of the haste, and still stronger of the inexperience, under which they were framed. It is but too obvious that in some instances the fundamental principle under consideration has been violated by too great a mixture, and even an actual consolidation, of the different powers; and that in no instance has a competent provision been made for maintaining in practice the separation delineated on paper. What I have wished to evince is that the charge brought against the proposed Constitution, of violating the sacred maxim of free government, is warranted neither by the real meaning annexed to that maxim by its author, nor by the sense in which it has hitherto been understood in America. This interesting subject will be resumed in the ensuing paper. PUBLIUS.

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No. 48 [47][1]. (*New York Packet*, February 1, 1788.) Madison.

MEANS OF GIVING INDEPENDENCE TO THE DIFFERENT DEPARTMENTS.

Powers of one department, it is conceded, should not be exercised by another—One department should not have an overruling influence over another—Security against the invasion of one department by another considered—The tendency of the legislature to absorb the other departments—Reasons for this—An instance of encroachments in Virginia—Experience in Pennsylvania.

To the People of the State of New York:

It was shown in the last paper that the political apothegm there examined does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other. I shall undertake, in the next place, to show that unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.

It is agreed, on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that none of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each against the invasion of the others. What this security ought to be, is the great problem to be solved.

Will it be sufficient to mark with precision the

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boundaries of these departments in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American constitutions. But experience assures us that the efficacy of the provision has been greatly overrated, and that some more adequate defense is indispensably necessary for the more feeble, against the more powerful members of the government. The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.

The founders of our republics have so much merit for the wisdom which they have displayed that no task can be less pleasing than that of pointing out the errors into which they have fallen. A respect for truth, however, obliges us to remark that they seem never for a moment to have turned their eyes from the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority. They seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations.[1]

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[1] That the legislative department has sought persistently, and to a certain extent successfully, to encroach on the power of the executive department, history has plainly shown. The most material assumptions have been those connected with the choice of the Executive, with his power of appointment, with his veto power, and finally with the treaty-making power.

It was the intention of the framers of the constitution that the electoral college should choose the President and that Congress should have no concern in his election beyond the mere formal counting of the votes and the announcement of the result. With absolute unconstitutionality and by gradual usurpation Congress has extended its power until to-day it claims the right to go behind the vote and reject or accept what it chooses, thus practically taking the election of President into its own hands; this power it successfully employed in 1876 to defeat the people's will by excluding from office the President actually elected. Doubly regrettable was the action of the supreme court, for, in place of restraining this assumption of Congress, the court actually made itself a party to this most high-handed proceeding, when certain judges acted as members

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In a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire. In a democracy, where a multitude of people exercise in person the legislative functions, and are continually exposed, by their incapacity for regular deliberation and concerted measures, to the ambitious intrigues of their executive magistrates, tyranny may well be apprehended, on some favorable emergency, to start up in the same quarter. But in a representative republic, where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by

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of the electoral commission. Nor is this grasp of power the only attempt Congress has made to interfere in the election of President. The early Congresses of the Union assumed the right to nominate the President, and for thirty years successfully forced upon the people candidates for President. The legislative enmity to Jackson in 1824 led to the nomination of another man, when the popular bent of the people had declared for Jackson; and when Jackson in that year received a plurality though not a majority of the electoral college, Congress, when the election came before it, elected Adams in his stead. By this act, in the words of the convention of Maryland, "the will of a majority of the states as well as of the people of the Union has been defeated," and such a storm arose as to sweep Jackson into power at the next election. The people resumed the right of nomination by means of popular conventions and forever ended the power of Congress to nominate the President of the United States. It is to be wished that some equally unpopular action in the future will result in the people taking from Congress the unconstitutional function of canvassing the returns of the electoral college.

The second class of assumptions has consisted in a persistent endeavor to gain greater control over appointments. The first evidence of this was an attempt to decide on the grade of office of the first diplomatic nominations, but Washington refused to allow the Senate any power in the matter, save that of confirmation or rejection. (See Jefferson's "Writings," v. 161.) A second, and recurring, invasion has been a demand for documents on which nominees were selected, first made on Washington, and last on Cleveland, and always refused. But the most serious form has been the insistence of members of both houses that they be allowed to name the local officials, which has been resisted only by the strongest and most honest Presidents, and which has done more to corrupt both the legislative and executive branches of our government than any other one force.

The third class of assumptions has been in the direction of lessening the

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a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.

The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is not unfrequently a question of real nicety in legislative bodies, whether the operation of a particular measure will, or will not, extend beyond the

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value of the Presidential veto, by attaching what are called "riders" to appropriation or other bills, as a method of compelling the consent of the President to what he would choose to veto. Thus, in 1867, in the conflict between the President and Congress, the latter attached to the army appropriation bill a clause actually depriving the President of the command of the army, and Johnson, though protesting, felt compelled to sign rather than veto the whole bill. Hayes, with more resolution, successively vetoed five appropriation bills carrying riders, and after a long struggle Congress yielded. Both Grant and Arthur in their messages of December 1, 1873, and December 5, 1882, urged a constitutional amendment, which should prevent the evil, either by requiring that every bill be limited to one object, or that a veto of separate items be permitted.

Lastly, the House of Representatives has several times sought to obtain a share in treaty-making, by asserting a control over all treaties which involved questions of revenue. After long debate, this claim was denied in the consideration of the Jay treaty of 1795, but the infringement was surrendered to the representatives by President Jefferson in the consideration of the Louisiana treaty of 1803, and from that time has been frequently permitted. The most notable case was the Hawaiian reciprocity treaty of 1876, which contained the distinct provision that it should not take effect until Congress should pass an act to carry out certain of its provisions. So, too, Congress has gone so far as to abrogate treaties by statute, as in 1798, when the French treaty was declared wholly terminated by an act, and by laws contravening certain clauses of treaties when they related to internal concerns; and this right has been upheld by the decisions of the courts. A pronounced example was the Chinese exclusion act, which entirely contravened our treaty with China.—EDITOR.

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legislative sphere. On the other side, the executive power being restrained within a narrower compass, and being more simple in its nature, and the judiciary being described by landmarks still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves. Nor is this all: as the legislative department alone has access to the pockets of the people, and has in some constitutions full discretion, and in all a prevailing influence, over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter which gives still greater facility to encroachments of the former.

I have appealed to our own experience for the truth of what I advance on this subject. Were it necessary to verify this experience by particular proofs, they might be multiplied without end. I might find a witness in every citizen who has shared in, or been attentive to, the course of public administrations. I might collect vouchers in abundance from the records and archives of every State in the Union. But as a more concise, and at the same time equally satisfactory evidence, I will refer to the example of two States, attested by two unexceptionable authorities.

The first example is that of Virginia, a State which, as we have seen, has expressly declared in its constitution that the three great departments ought not to be intermixed. The authority in support of it is Mr. Jefferson, who, besides his other advantages for remarking the operation of the government, was himself the chief magistrate of it. In order to convey fully the ideas with which his experience had impressed him on this subject, it will be necessary to quote a passage of some length from his very interesting "Notes on the State of Virginia," p. 195. "All the powers of government—legislative, executive, and judiciary—result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. Let those who doubt it turn their eyes on the republic of Venice. As little will it avail us that they are chosen by ourselves. An *elective despotism* was not the government we fought for, but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among

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several bodies of magistracy as that no one could transcend their legal limits without being effectually checked and restrained by the others. For this reason, that convention which passed the ordinance of government laid its foundation on this basis, that the legislative, executive, and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. *But no barrier was provided between these several powers.* The judiciary and the executive members were left dependent on the legislative for their subsistence in office, and some of them for their continuance in it. If, therefore, the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can be effectual; because, in that case, they may put their proceedings into the form of acts of Assembly, which will render them obligatory on the other branches. They have accordingly, *in many* instances, *decided rights* which should have been left to *judiciary controversy*, and *the direction of the executive, during the whole time of their session, is becoming habitual and familiar.*"

The other State which I shall take for an example is Pennsylvania; and the other authority, the Council of Censors, which assembled in the years 1783 and 1784. A part of the duty of this body, as marked out by the constitution, was "to inquire whether the constitution had been preserved inviolate in every part; and whether the legislative and executive branches of government had performed their duty as guardians of the people, or assumed to themselves, or exercised, other or greater powers than they are entitled to by the constitution." In the execution of this trust the council were necessarily led to a comparison of both the legislative and executive proceedings, with the constitutional powers of these departments; and from the facts enumerated, and to the truth of most of which both sides in the council subscribed, it appears that the constitution had been flagrantly violated by the legislature in a variety of important instances.

A great number of laws had been passed, violating, without any apparent necessity, the rule requiring that all bills of a public nature shall be previously printed for the consideration of the people; although this is one of the precautions chiefly relied on by the constitution against improper acts of the legislature.

The constitutional trial by jury had been violated, and powers assumed which had not been delegated by the constitution.

Executive powers had been usurped.

The salaries of the judges, which the constitution expressly requires to be fixed, had been occasionally varied; and cases belong-

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ing to the judiciary department frequently drawn within .egislative cognizance and determination.

Those who wish to see the several particulars falling under each of these heads may consult the journals of the council, which are in print. Some of them, it will be found, may be imputable to peculiar circumstances connected with the war; but the greater part of them may be considered as the spontaneous shoots of an ill-constituted government.

It appears, also, that the executive department had not been innocent of frequent breaches of the constitution. There are three observations, however, which ought to be made on this head: *first*, a great proportion of the instances were either immediately produced by the necessities of the war, or recommended by Congress or the commander-in-chief; *secondly*, in most of the other instances, they conformed either to the declared or the known sentiments of the legislative department; *thirdly*, the executive department of Pennsylvania is distinguished from that of the other States by the number of members composing it. In this respect, it has as much affinity to a legislative assembly as to an executive council. And being at once exempt from the restraint of an individual responsibility for the acts of the body, and deriving confidence from mutual example and joint influence, unauthorized measures would, of course, be more freely hazarded than where the executive department is administered by a single hand, or by a few hands.

The conclusion which I am warranted in drawing from these observations is that a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.

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No. 49 [48]. (*Independent Journal*, February 2, 1788.) Madison (?)

PROBABLE EXCESSIVE INFLUENCE OF THE LEGISLATIVE DEPARTMENT.

Propriety of a well-defined mode of appealing to the people—A sufficient remedy—Very dangerous and useless if too frequently applied—Reasons for this—When such appeals are useful—Remarks on occasional appeals to the people.

To the People of the State of New York:

The author of the "Notes on the State of Virginia," quoted in the last paper, has subjoined to that valuable work the draught of a constitution which had been prepared in order to be laid before a convention expected to be called in 1783, by the legislature, for the establishment of a constitution for that commonwealth. The plan, like everything from the same pen, marks a turn of thinking, original, comprehensive, and accurate; and is the more worthy of attention as it equally displays a fervent attachment to republican government and an enlightened view of the dangerous propensities against which it ought to be guarded. One of the precautions which he proposes, and on which he appears ultimately to rely as a palladium to the weaker departments of power against the invasions of the stronger, is perhaps altogether his own, and, as it immediately relates to the subject of our present inquiry, ought not to be overlooked.

His proposition is "that whenever any two of the three branches of government shall concur in opinion, each by the voices of two-thirds of their whole number, that a convention is necessary for altering the constitution, or *correcting breaches of it*, a convention shall be called for the purpose."

As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived, it seems strictly consonant to the republican theory to recur to the same original

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authority not only whenever it may be necessary to enlarge, diminish, or new-model the powers of the government, but also whenever any one of the departments may commit encroachments on the chartered authorities of the others. The several departments being perfectly co-ordinate by the terms of their common commission, none of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers; and how are the encroachments of the stronger to be prevented, or the wrongs of the weaker to be redressed, without an appeal to the people themselves, who, as the grantors of the commission, can alone declare its true meaning and enforce its observance?

There is certainly great force in this reasoning, and it must be allowed to prove that a constitutional road to the decision of the people ought to be marked out and kept open for certain great and extraordinary occasions. But there appear to be insuperable objections against the proposed recurrence to the people as a provision, in all cases, for keeping the several departments of power within their constitutional limits.

In the first place, the provision does not reach the case of a combination of two of the departments against the third. If the legislative authority, which possesses so many means of operating on the motives of the other departments, should be able to gain to its interest either of the others, or even one-third of its members, the remaining department could derive no advantage from its remedial provision. I do not dwell, however, on this objection, because it may be thought to be rather against the modification of the principle than against the principle itself.

In the next place, it may be considered as an objection inherent in the principle that, as every appeal to the people would carry an implication of some defect in the government, frequent appeals would in a great measure deprive the government of that veneration which time bestows on everything, and

See No. 46.

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without which perhaps the wisest and freest governments would not possess the requisite stability. If it be true that all governments rest on opinion, it is no less true that the strength of opinion in each individual, and its practical influence on his conduct, depend much on the number which he supposes to have entertained the same opinion. The reason of man, like man himself, is timid and cautious when left alone, and acquires firmness and confidence in proportion to the number with which it is associated. When the examples which fortify opinion are *ancient* as well as *numerous*, they are known to have a double effect. In a nation of philosophers, this consideration ought to be disregarded. A reverence for the laws would be sufficiently inculcated by the voice of an enlightened reason. But a nation of philosophers is as little to be expected as the philosophical race of kings wished for by Plato. And in every other nation the most rational government will not find it a superfluous advantage to have the prejudices of the community on its side.

The danger of disturbing the public tranquillity by interesting too strongly the public passions is a still more serious objection against a frequent reference of constitutional questions to the decision of the whole society. Notwithstanding the success which has attended the revisions of our established forms of government, and which does so much honor to the virtue and intelligence of the people of America, it must be confessed that the experiments are of too ticklish a nature to be unnecessarily multiplied. We are to recollect that all the existing constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord; of an enthusiastic confidence of the people in their patriotic leaders which stifled the ordinary diversity of opinions on great national questions; of a universal ardor for new and opposite forms, produced by a universal resentment and indignation against the ancient government; and whilst no spirit of party connected with the changes to be made, or the

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abuses to be reformed, could mingle its leaven in the operation. The future situations in which we must expect to be usually placed, do not present any equivalent security against the danger which is apprehended.

But the greatest objection of all is that the decisions which would probably result from such appeals would not answer the purpose of maintaining the constitutional equilibrium of the government. We have seen that the tendency of republican governments is to an aggrandizement of the legislative at the expense of the other departments. The appeals to the people, therefore, would usually be made by the executive and judiciary departments. But whether made by one side or the other, would each side enjoy equal advantages on the trial? Let us view their different situations. The members of the executive and judiciary departments are few in number, and can be personally known to a small part only of the people. The latter, by the mode of their appointment, as well as by the nature and permanency of it, are too far removed from the people to share much in their prepossessions. The former are generally the objects of jealousy, and their administration is always liable to be discolored and rendered unpopular. The members of the legislative department, on the other hand, are numerous. They are distributed and dwell among the people at large. Their connections of blood, of friendship, and of acquaintance embrace a great proportion of the most influential part of the society. The nature of their public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the people. With these advantages, it can hardly be supposed that the adverse party would have an equal chance for a favorable issue.

But the legislative party would not only be able to plead their cause most successfully with the people. They would probably be constituted themselves the judges. The same influence which had gained them an election into the legislature, would gain them a seat in

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the convention. If this should not be the case with all, it would probably be the case with many, and pretty certainly with those leading characters on whom everything depends in such bodies. The convention, in short, would be composed chiefly of men who had been, who actually were, or who expected to be, members of the department whose conduct was arraigned. They would consequently be parties to the very question to be decided by them.

It might, however, sometimes happen that appeals would be made under circumstances less adverse to the executive and judiciary departments. The usurpations of the legislature might be so flagrant and so sudden as to admit of no specious coloring. A strong party among themselves might take side with the other branches. The executive power might be in the hands of a peculiar favorite of the people.[1] In such a posture of things, the public decision might be less swayed by prepossessions in favor of the legislative party. But still it could never be expected to turn on the true merits of the question. It would inevitably be connected with the spirit of pre-existing parties, or of parties springing out of the question itself. It would be connected with persons of distinguished character and extensive influence in the community. It would be pronounced by the very men who had been agents in, or opponents of, the measures to which the decision would relate. The *passions*, therefore, not the *reason*, of the public would sit in judgment. But it is the reason, alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government.

We found in the last paper, that mere declarations in the written constitution are not sufficient to restrain the several departments within their legal rights. It appears in this that occasional appeals to the people would be

[1] Mr. Bryce, with admirable discrimination, asserts that "whenever the President is weak and unpopular, Congress seems to be gaining on the Executive Chief. When the latter is presumably strong, he can keep the Legislature at bay."—EDITOR.

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neither a proper nor an effectual provision for that purpose. How far the provisions of a different nature contained in the plan above quoted might be adequate, I do not examine. Some of them are unquestionably founded on sound political principles, and all of them are framed with singular ingenuity and precision. PUBLIUS.

No. 50 [49]. (*New York Packet*, February 5, 1788.) Madison (?)

PERIODICAL CORRECTING OF INFRACTIONS OF THE CONSTITUTION.

The merits and disadvantages of short and long intervals—Example of Pennsylvania.

To the People of the State of New York:

It may be contended, perhaps, that instead of *occasional* appeals to the people, which are liable to the objections urged against them, *periodical* appeals are the proper and adequate means of *preventing and correcting infractions of the Constitution.*[1]

It will be attended to that, in the examination of these expedients, I confine myself to their aptitude for *enforcing* the Constitution, by keeping the several departments

[1] Although no special provision for periodical revision of the constitution was provided in that instrument, appeals for a convention to reshape the government have been recurrent with each apparent crisis. Even before the adoption of the federal constitution, its opponents urged the calling of a convention to revise it (see E. P. Smith's "The Movement towards a Second Constitutional Convention in 1788" [In Jameson's "Essays in the Constitutional History of the United States," 1889]). In the contested election of 1801, the Republicans threatened to "invite" a convention which "would have repaired the Constitution where it was defective and wound it up again," and the fear of what an extra-legal body, originating from such a call, might do to the frame of government, produced a prompt surrender on the part of the Federalists. The Hartford convention, in 1814, recommended a revision of the constitution. The South Carolina convention of 1832, in its address to the states, asserted that the only alternative to a modification of the tariff would be "the call for a general convention of all the states." In 1861 the Peace conference, called by the border states, framed a series of amendments to the constitution (see Appendix).—EDITOR.

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of power within their due bounds, without particularly considering them as provisions for *altering* the Constitution itself. In the first view, appeals to the people at fixed periods appear to be nearly as ineligible as appeals on particular occasions as they emerge. If the periods be separated by short intervals, the measures to be reviewed and rectified will have been of recent date, and will be connected with all the circumstances which tend to vitiate and pervert the result of occasional revisions. If the periods be distant from each other, the same remark will be applicable to all recent measures; and in proportion as the remoteness of the others may favor a dispassionate review of them, this advantage is inseparable from inconveniences which seem to counterbalance it. In the first place, a distant prospect of public censure would be a very feeble restraint on power from those excesses to which it might be urged by the force of present motives. Is it to be imagined that a legislative assembly, consisting of a hundred or two hundred members, eagerly bent on some favorite object, and breaking through the restraints of the Constitution in pursuit of it, would be arrested in their career, by considerations drawn from a censorial revision of their conduct at the future distance of ten, fifteen, or twenty years? In the next place, the abuses would often have completed their mischievous effects before the remedial provision would be applied. And in the last place, where this might not be the case, they would be of long standing, would have taken deep root, and would not easily be extirpated.

The scheme of revising the constitution, in order to correct recent breaches of it, as well as for other purposes, has been actually tried in one of the States. One of the objects of the Council of Censors which met in Pennsylvania in 1783 and 1784, was, as we have seen, to inquire "whether the constitution had been violated, and whether the legislative and executive departments had encroached on each other." This important and novel experiment in politics merits, in several points of view, very particular attention. In some of them it may, perhaps, as a single experiment, made under circumstances somewhat peculiar, be

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thought to be not absolutely conclusive. But as applied to the case under consideration, it involves some facts, which I venture to remark, as a complete and satisfactory illustration of the reasoning which I have employed.

First. It appears, from the names of the gentlemen who composed the council, that some, at least, of its most active and leading members had also been active and leading characters in the parties which pre-existed in the State.

Secondly. It appears that the same active and leading members of the council had been active and influential members of the legislative and executive branches, within the period to be reviewed, and even patrons or opponents of the very measures to be thus brought to the test of the Constitution. Two of the members had been vice presidents of the State, and several others members of the executive council, within the seven preceding years. One of them had been speaker, and a number of others distinguished members, of the legislative assembly within the same period.

Thirdly. Every page of their proceedings witnesses the effect of all these circumstances on the temper of their deliberations. Throughout the continuance of the council, it was split into two fixed and violent parties. The fact is acknowledged and lamented by themselves. Had this not been the case, the face of their proceedings exhibits a proof equally satisfactory. In all questions, however unimportant in themselves, or unconnected with each other, the same names stand invariably contrasted on the opposite columns. Every unbiased observer may infer, without danger of mistake, and at the same time without meaning to reflect on either party, or any individuals of either party, that, unfortunately, *passion*, not *reason*, must have presided over their decisions. When men exercise their reason coolly and freely on a variety of distinct questions, they inevitably fall into different opinions on some of them. When they are governed by a common passion, their opinions, if they are so to be called, will be the same.

Fourthly. It is at least problematical whether the decisions of this body do not, in several instances, misconstrue the limits prescribed for the legislative and executive departments, instead of reducing and limiting them within their constitutional places.

Fifthly. I have never understood that the decisions of the council on constitutional questions, whether rightly or erroneously formed, have had any effect in varying the practice founded on legislative constructions. It even appears, if I mistake not, that in one instance the contemporary legislature denied the constructions of the council, and actually prevailed in the contest.

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This censorial body, therefore, proves at the same time, by its researches, the existence of the disease, and, by its example, the inefficacy of the remedy.

This conclusion cannot be invalidated by alleging that the State in which the experiment was made was at that crisis, and had been for a long time before, violently heated and distracted by the rage of party. Is it to be presumed that, at any future septennial epoch, the same State will be free from parties? Is it to be presumed that any other State, at the same or any other given period, will be exempt from them? Such an event ought to be neither presumed nor desired; because an extinction of parties necessarily implies either a universal alarm for the public safety, or an absolute extinction of liberty.

Were the precaution taken of excluding from the assemblies elected by the people to revise the preceding administration of the government, all persons who should have been concerned with the government within the given period, the difficulties would not be obviated. The important task would probably devolve on men, who, with inferior capacities, would in other respects be little better qualified. Although they might not have been personally concerned in the administration, and therefore not immediately agents in the measures to be examined, they would probably have been involved in the parties connected with these measures, and have been elected under their auspices.

PUBLIUS.

No. 51 [50]. (*Independent Journal*, February 6, 1788.) Madison (?)

METHOD OF BALANCING THE DEPARTMENTS OF GOVERNMENT.

Modes of obtaining mutual checks and balances—Advantages of the federal government in securing the rights of the people—Division of the delegated powers—Different interests among the people.

To the People of the State of New York:

To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Con-

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stitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. Without presuming to undertake a full development of this important idea, I will hazard a few general observations, which may perhaps place it in a clearer light and enable us to form a more correct judgment of the principles and structure of the government planned by the convention.

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own, and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another. Perhaps such a plan of constructing the several departments would be less difficult in practice than it may in contemplation appear. Some difficulties, however, and some additional expense would attend the execution of it. Some deviations, therefore, from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them.

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It is equally evident that the members of each department should be as little dependent as possible on those of the others for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.

But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.[1] It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

This policy of supplying, by opposite and rival

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[1] This tendency of the office-holder to resist encroachment on his own prerogatives, and to endeavor to increase his own power, is so universal that it scarcely needs illustration. Though Jefferson came to the presidency pledged to reduce its powers, Gouverneur Morris predicted that far from the probability of his "discarding" power, "we may fairly trust the Ambition which seeks Office, for holding the power which it confers," and time proved his correctness, for no other President has so greatly added to the influence of the executive, nor so often undertaken to interfere in the legislative and judicial departments.—EDITOR.

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interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other —that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.

But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified. An absolute negative on the legislature appears, at first view, to be the natural defense with which the executive magistrate should be armed. But perhaps it would be neither altogether safe nor alone sufficient. On ordinary occasions it might not be exerted with the requisite firmness, and on extraordinary occasions it might be perfidiously abused. May not this defect of an absolute negative be supplied by some qualified connection between this weaker department and the weaker branch of the stronger department, by which the latter may be led to support the constitutional rights of the former, without being too much detached from the rights of its own department?

If the principles on which these observations are founded be just, as I persuade myself they are, and they be applied as a criterion to the several State constitu-

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tions, and to the federal Constitution, it will be found that if the latter does not perfectly correspond with them, the former are infinitely less able to bear such a test.

There are, moreover, two considerations particularly applicable to the federal system of America, which place that system in a very interesting point of view.

First. In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Second. It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority—that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary or self-appointed authority. This, at best, is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major, as the rightful interests of the minor party, and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States. Whilst all

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authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government. This view of the subject must particularly recommend a proper federal system to all the sincere and considerate friends of republican government, since it shows that in exact proportion as the territory of the Union may be formed into more circumscribed Confederacies, or States, oppressive combinations of a majority will be facilitated; the best security, under the republican forms, for the rights of every class of citizens will be diminished; and consequently the stability and independence of some member of the government, the only other security, must be proportionally increased. Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful. It can be little doubted that if the State of Rhode Island

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was separated from the Confederacy and left to itself, the insecurity of rights under the popular form of government within such narrow limits would be displayed by such reiterated oppressions of factious majorities, that some power altogether independent of the people would soon be called for by the voice of the very factions whose misrule had proved the necessity of it. In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good; whilst there being thus less danger to a minor from the will of a major party, there must be less pretext, also, to provide for the security of the former, by introducing into the government a will not dependent on the latter, or, in other words, a will independent of the society itself. It is no less certain than it is important, notwithstanding the contrary opinions which have been entertained, that the larger the society, provided it lie within a practical sphere, the more duly capable it will be of self-government. And happily for the *republican cause*, the practicable sphere may be carried to a very great extent, by a judicious modification and mixture of the *federal principle*.

PUBLIUS.

No. 52 [51]. (*New York Packet*, February 8, 1788.) Hamilton (?)

QUALIFICATION AND TERM OF HOUSE OF REPRESENTATIVES.

Electors—The qualifications of the members—The term of office—Biennial elections—Value of frequent elections—Terms of service in other governments—In England, Ireland, and in the American colonies—Biennial elections not dangerous—Reasons for this drawn from the nature and position of Congress.

To the People of the State of New York:

From the more general inquiries pursued in the four last papers, I pass on to a more particular examination of the several parts of the government. I shall begin with the House of Representatives.

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The first view to be taken of this part of the government relates to the qualifications of the electors and the elected.

Those of the former are to be the same with those of the electors of the most numerous branch of the State legislatures. The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the convention, therefore, to define and establish this right in the Constitution. To have left it open for the occasional regulation of the Congress would have been improper, for the reason just mentioned. To have submitted it to the legislative discretion of the States would have been improper for the same reason; and for the additional reason that it would have rendered too dependent on the State governments that branch of the federal government which ought to be dependent on the people alone. To have reduced the different qualifications in the different States to one uniform rule would probably have been as dissatisfactory to some of the States as it would have been difficult to the convention. The provision made by the convention appears, therefore, to be the best that lay within their option. It must be satisfactory to every State, because it is comformable to the standard already established, or which may be established, by the State itself. It will be safe to the United States, because, being fixed by the State constitutions, it is not alterable by the State governments, and it cannot be feared that the people of the States will alter this part of their constitutions in such a manner as to abridge the rights secured to them by the federal Constitution.

The qualifications of the elected, being less carefully and properly defined by the State constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the convention. A representative of the United States must be of the age of twenty-five years; must have been seven years a citizen of the United States; must, at the time of his election, be an inhabitant of the State he is to

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represent; and, during the time of his service, must be in no office under the United States. Under these reasonable limitations, the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith.

The term for which the representatives are to be elected falls under a second view which may be taken of this branch. In order to decide on the propriety of this article, two questions must be considered: first, whether biennial elections will, in this case, be safe; secondly, whether they be necessary or useful.

First. As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration should have an immediate dependence on, and an intimate sympathy with, the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured. But what particular degree of frequency may be absolutely necessary for the purpose does not appear to be susceptible of any precise calculation, and must depend on a variety of circumstances with which it may be connected. Let us consult experience, the guide that ought always to be followed whenever it can be found.

The scheme of representation, as a substitute for a meeting of the citizens in person, being at most but very imperfectly known to ancient polity, it is in more modern times only that we are to expect instructive examples. And even here, in order to avoid a research too vague and diffusive, it will be proper to confine ourselves to the few examples which are best known, and which bear the greatest analogy to our particular case. The first to which this character ought to be applied is the House of Commons in Great Britain. The history of this branch of the English Constitution, anterior to the date of Magna Charta, is too obscure to yield instruction. The very existence of it has been made a question among political antiquaries. The earliest records of subsequent date prove that parliaments were to *sit* only every year; not that they were to be *elected* every year. And even

See No. 14.

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these annual sessions were left so much at the discretion of the monarch that, under various pretexts, very long and dangerous intermissions were often contrived by royal ambition. To remedy this grievance, it was provided by a statute, in the reign of Charles II., that the intermissions should not be protracted beyond a period of three years. On the accession of William III., when a revolution took place in the government, the subject was still more seriously resumed, and it was declared to be among the fundamental rights of the people that parliaments ought to be held *frequently*. By another statute, which passed a few years later in the same reign, the term "frequently," which had alluded to the triennial period settled in the time of Charles II., is reduced to a precise meaning; it being expressly enacted that a new parliament shall be called within three years after the termination of the former. The last change, from three to seven years, is well known to have been introduced pretty early in the present century, under an alarm for the Hanoverian succession. From these facts it appears that the greatest frequency of elections which has been deemed necessary in that kingdom, for binding the representatives to their constituents, does not exceed a triennial return of them. And if we may argue from the degree of liberty retained even under septennial elections, and all the other vicious ingredients in the parliamentary constitution, we cannot doubt that a reduction of the period from seven to three years, with the other necessary reforms, would so far extend the influence of the people over their representatives as to satisfy us that biennial elections, under the federal system, cannot possibly be dangerous to the requisite dependence of the House of Representatives on their constituents.

Elections in Ireland, till of late, were regulated entirely by the discretion of the crown, and were seldom repeated, except on the accession of a new prince, or some other contingent event. The parliament which commenced with George II. was continued throughout his whole reign, a period of about thirty-five years. The only dependence of the representatives on the people consisted in the right of the latter to supply occasional vacancies, by the election of new members, and in the chance of some event which might produce a general new election. The ability also of the Irish parliament to maintain the rights of their constituents, so far as the disposition might exist, was extremely shackled by the control of the crown over the subjects of their deliberation. Of late, these shackles, if I mistake not, have been broken; and octennial parliaments have besides been established. What effect may be produced by this partial reform must be left to further experi-

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ence. The example of Ireland, from this view of it, can throw but little light on the subject. As far as we can draw any conclusion from it, it must be that if the people of that country have been able under all these disadvantages to retain any liberty whatever, the advantage of biennial elections would secure to them every degree of liberty which might depend on a due connection between their representatives and themselves.

Let us bring our inquiries nearer home. The example of these States, when British colonies, claims particular attention, at the same time that it is so well known as to require little to be said on it. The principle of representation, in one branch of the legislature at least, was established in all of them. But the periods of election were different. They varied from one to seven years. Have we any reason to infer, from the spirit and conduct of the representatives of the people prior to the Revolution, that biennial elections would have been dangerous to the public liberties? The spirit which everywhere displayed itself at the commencement of the struggle, and which vanquished the obstacles to independence, is the best of proofs that a sufficient portion of liberty had been everywhere enjoyed to inspire both a sense of its worth and a zeal for its proper enlargement. This remark holds good, as well with regard to the then colonies whose elections were least frequent as to those whose elections were most frequent. Virginia was the colony which stood first in resisting the parliamentary usurpations of Great Britain; it was the first also in espousing, by public act, the resolution of independence. In Virginia, nevertheless, if I have not been misinformed, elections under the former government were septennial. This particular example is brought into view, not as a proof of any peculiar merit, for the priority in those instances was probably accidental; and still less of any advantage in *septennial* elections, for when compared with a greater frequency they are admissible; but merely as a proof, and I conceive it to be a very substantial proof, that the liberties of the people can be in no danger from *biennial* elections.

The conclusion resulting from these examples will be

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not a little strengthened by recollecting three circumstances. The first is that the federal legislature will possess a part only of that supreme legislative authority which is vested completely in the British Parliament; and which, with a few exceptions, was exercised by the colonial assemblies and the Irish legislature. It is a received and well-founded maxim that, where no other circumstances affect the case, the greater the power is, the shorter ought to be its duration; and conversely, the smaller the power, the more safely may its duration be protracted. In the second place, it has on another occasion been shown that the federal legislature will not only be restrained by its dependence on the people, as other legislative bodies are, but that it will be, moreover, watched and controlled by the several collateral legislatures, which other legislative bodies are not. And in the third place, no comparison can be made between the means that will be possessed by the more permanent branches of the federal government for seducing, if they should be disposed to seduce, the House of Representatives from their duty to the people, and the means of influence over the popular branch possessed by the other branches of the government above cited. With less power, therefore, to abuse, the federal representatives can be less tempted on one side, and will be doubly watched on the other.

PUBLIUS.

No. 53 [52]. (*Independent Journal*, February 9, 1788.) Hamilton (?)

TERM OF HOUSE OF REPRESENTATIVES.

Objections that when annual elections end tyranny begins, answered—Biennial elections necessary and useful—Objections to unduly short terms—Biennial elections useful and safe.

To the People of the State of New York:

I shall here, perhaps, be reminded of a current observation, "that where annual elections end, tyranny begins." If it be true, as has often been remarked, that

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sayings which become proverbial are generally founded in reason, it is not less true that, when once established, they are often applied to cases to which the reason of them does not extend. I need not look for a proof beyond the case before us. What is the reason on which this proverbial observation is founded? No man will subject himself to the ridicule of pretending that any natural connection subsists between the sun or the seasons and the period within which human virtue can bear the temptations of power. Happily for mankind, liberty is not, in this respect, confined to any single point of time; but lies within extremes, which afford sufficient latitude for all the variations which may be required by the various situations and circumstances of civil society. The election of magistrates might be, if it were found expedient, as in some instances it actually has been, daily, weekly, or monthly, as well as annual; and if circumstances may require a deviation from the rule on one side, why not also on the other side? Turning our attention to the periods established among ourselves for the election of the most numerous branches of the State legislatures, we find them by no means coinciding any more in this instance than in the elections of other civil magistrates. In Connecticut and Rhode Island the periods are half-yearly. In the other States, South Carolina excepted, they are annual. In South Carolina they are biennial—as is proposed in the federal government. Here is a difference, as four to one, between the longest and shortest periods; and yet it would be not easy to show that Connecticut or Rhode Island is better governed, or enjoys a greater share of rational liberty, than South Carolina; or that either the one or the other of these States is distinguished in these respects, and by these causes, from the States whose elections are different from both.

In searching for the grounds of this doctrine I can discover but one, and that is wholly inapplicable to our case. The important distinction, so well understood in America, between a Constitution established by the

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people and unalterable by the government, and a law established by the government and alterable by the government, seems to have been little understood and less observed in any other country. Wherever the supreme power of legislation has resided, has been supposed to reside also a full power to change the form of the government. Even in Great Britain, where the principles of political and civil liberty have been most discussed, and where we hear most of the rights of the Constitution, it is maintained that the authority of the Parliament is transcendent and uncontrollable, as well with regard to the Constitution as the ordinary objects of legislative provision. They have accordingly, in several instances, actually changed, by legislative acts, some of the most fundamental articles of the government. They have in particular, on several occasions, changed the period of election; and, on the last occasion, not only introduced septennial in place of triennial elections, but by the same act continued themselves in place four years beyond the term for which they were elected by the people. An attention to these dangerous practices has produced a very natural alarm in the votaries of free government, of which frequency of elections is the corner stone; and has led them to seek for some security to liberty against the danger to which it is exposed. Where no constitution, paramount to the government, either existed or could be obtained, no constitutional security, similar to that established in the United States, was to be attempted. Some other security, therefore, was to be sought for; and what better security would the case admit than that of selecting and appealing to some simple and familiar portion of time as a standard for measuring the danger of innovations, for fixing the national sentiment, and for uniting the patriotic exertions? The most simple and familiar portion of time, applicable to the subject, was that of a year; and hence the doctrine has been inculcated by a laudable zeal, to erect some barrier against the gradual innovations of an unlimited government, that the advance toward tyranny was to be

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calculated by the distance of departure from the fixed point of annual elections. But what necessity can there be of applying this expedient to a government limited, as the federal government will be, by the authority of a paramount Constitution? Or who will pretend that the liberties of the people of America will not be more secure under biennial elections, unalterably fixed by such a Constitution, than those of any other nation would be, where elections were annual, or even more frequent, but subject to alterations by the ordinary power of the government?

The second question stated is, whether biennial elections be necessary or useful. The propriety of answering this question in the affirmative will appear from several very obvious considerations.

No man can be a competent legislator who does not add to an upright intention and a sound judgment a certain degree of knowledge of the subjects on which he is to legislate. A part of this knowledge may be acquired by means of information which lie within the compass of men in private as well as public stations. Another part can only be attained, or at least thoroughly attained, by actual experience in the station which requires the use of it.[1] The period of service ought, therefore, in all such cases, to bear some proportion to the extent of practical knowledge requisite to the due performance of the service. The period of legislative service established in most of the States for the more numerous branch is, as we have seen, one year. The question then may be put into this simple form: does

See No. 62.

[1] With the disappearance, or rather submergence, of congressional oratory and the increased complication of legislative measures, a term in Congress has become almost a necessity before any member can make his influence strongly felt. Those states, therefore, which have a tendency to re-elect the same men are apt to secure a slightly greater influence on legislation, as compared with those which frequently change their representatives, because the representatives of the former gain a greater knowledge of congressional practice, and also because they increase their chances of appointments on committees. It was through the constant re-election of Clay, Calhoun, and Webster, far more than by their speeches, that these men came to wield the power which they did. To-day scarcely a member of Congress is known beyond his state, unless he has served more than one term in that body.—EDITOR.

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the period of two years bear no greater proportion to the knowledge requisite for federal legislation than one year does to the knowledge requisite for State legislation? The very statement of the question, in this form, suggests the answer that ought to be given to it.

In a single State the requisite knowledge relates to the existing laws, which are uniform throughout the State, and with which all the citizens are more or less conversant; and to the general affairs of the State, which lie within a small compass, are not very diversified, and occupy much of the attention and conversation of every class of people. The great theater of the United States presents a very different scene. The laws are so far from being uniform that they vary in every State; whilst the public affairs of the Union are spread throughout a very extensive region, and are extremely diversified by the local affairs connected with them, and can with difficulty be correctly learnt in any other place than in the central councils, to which a knowledge of them will be brought by the representatives of every part of the empire. Yet some knowledge of the affairs, and even of the laws, of all the States, ought to be possessed by the members from each of the States. How can foreign trade be properly regulated by uniform laws, without some acquaintance with the commerce, the ports, the usages, and the regulations of the different States? How can the trade between the different States be duly regulated, without some knowledge of their relative situations in these and other respects? How can taxes be judiciously imposed and effectually collected, if they be not accommodated to the different laws and local circumstances relating to these objects in the different States? How can uniform regulations for the militia be duly provided, without a similar knowledge of many internal circumstances by which the States are distinguished from each other? These are the principal objects of federal legislation, and suggest most forcibly the extensive information which the representatives ought to acquire. The other interior objects will require

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a proportional degree of information with regard to them.

It is true that all these difficulties will, by degrees, be very much diminished. The most laborious task will be the proper inauguration of the government and the primeval formation of a federal code. Improvements on the first draughts will every year become both easier and fewer. Past transactions of the government will be a ready and accurate source of information to new members. The affairs of the Union will become more and more objects of curiosity and conversation among the citizens at large.[1] And the increased intercourse among those of different States will contribute not a little to diffuse a mutual knowledge of their affairs, as this again will contribute to a general assimilation of their manners and laws. But with all these abatements, the business of federal legislation must continue so far to exceed, both in novelty and difficulty, the legislative business of a single State, as to justify the longer period of service assigned to those who are to transact it.

A branch of knowledge which belongs to the acquirements of a federal representative, and which has not been mentioned, is that of foreign affairs. In regulating our own commerce, he ought to be not only acquainted with the treaties between the United States and other nations, but also with the commercial policy and laws of other nations. He ought not to be altogether ignorant of the law of nations; for that, as far as it is a proper object of municipal legislation, is submitted to the federal government. And although the House of Representatives is not immediately to participate in foreign negotiations and arrangements, yet from the necessary connection between the several branches of public affairs, those particular branches will frequently deserve atten-

[1] If our press is a fair exemplar, the reverse of this is true. In 1790, or in 1840, the newspapers devoted proportionally far more space to national politics than they do in 1897. What is yet more striking, they rarely paid much heed to state, and almost none to local politics, both of which to-day receive as close attention and as much space as do general politics.—EDITOR.

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tion in the ordinary course of legislation, and will sometimes demand particular legislative sanction and cooperation. Some portion of this knowledge may, no doubt, be acquired in a man's closet; but some of it also can only be derived from the public sources of information; and all of it will be acquired to best effect by a practical attention to the subject during the period of actual service in the legislature.

There are other considerations,—of less importance, perhaps,—but which are not unworthy of notice. The distance which many of the representatives will be obliged to travel, and the arrangements rendered necessary by that circumstance, might be much more serious objections with fit men to this service, if limited to a single year, than if extended to two years. No argument can be drawn on this subject from the case of the delegates to the existing Congress. They are elected annually, it is true; but their re-election is considered by the legislative assemblies almost as a matter of course. The election of the representatives by the people would not be governed by the same principle.

A few of the members, as happens in all such assemblies, will possess superior talents; will, by frequent re-elections, become members of long standing; will be thoroughly masters of the public business, and perhaps not unwilling to avail themselves of those advantages. The greater the proportion of new members, and the less the information of the bulk of the members, the more apt will they be to fall into the snares that may be laid for them. This remark is no less applicable to the relation which will subsist between the House of Representatives and the Senate.

See No. 56.

It is an inconvenience mingled with the advantages of our frequent elections, even in single States, where they are large, and hold but one legislative session in a year, that spurious elections cannot be investigated and annulled in time for the decision to have its due effect. If a return can be obtained, no matter by what unlawful means, the irregular member, who takes his seat of course,

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is sure of holding it a sufficient time to answer his purposes. Hence, a very pernicious encouragement is given to the use of unlawful means for obtaining irregular returns. Were elections for the federal legislature to be annual, this practice might become a very serious abuse, particularly in the more distant States. Each House is, as it necessarily must be, the judge of the elections, qualifications, and returns of its members; and whatever improvements may be suggested by experience for simplifying and accelerating the process in disputed cases, so great a portion of a year would unavoidably elapse before an illegitimate member could be dispossessed of his seat, that the prospect of such an event would be little check to unfair and illicit means of obtaining a seat.[1]

All these considerations, taken together, warrant us in affirming that biennial elections will be as useful to the affairs of the public as we have seen that they will be safe to the liberty of the people. PUBLIUS.

No. 54 [53]. (*New York Packet*, February 12, 1788.) Hamilton (?)

RATIO OF REPRESENTATION IN LOWER BRANCH.

Numbers the proper standard for representation—Slave representation—Objection that slaves do not enter into local representation considered—The right of representation of property as well as persons—Votes in Congress should be proportioned to the wealth of the states—No inducement for falsifying the census, as it is the basis of taxation as well as of representation.

To the People of the State of New York:

The next view which I shall take of the House of Representatives relates to the appointment of its members to the several States, which is to be determined by the same rule with that of direct taxes.[2]

[1] Unfortunately, the House of Representatives, so far from attempting to make "improvements" in the system of judging disputed elections, has shown only an eagerness to seat those claimants who coincide in party views. This tendency is fully set forth in the "History of Disputed Elections."—EDITOR.

[2] This clause has been so modified by the XIVth Amendment as to make this number purely historical.—EDITOR.

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It is not contended that the number of people in each State ought not to be the standard for regulating the proportion of those who are to represent the people of each State. The establishment of the same rule for the appointment of taxes will probably be as little contested; though the rule itself in this case is by no means founded on the same principle. In the former case the rule is understood to refer to the personal rights of the people, with which it has a natural and universal connection. In the latter, it has reference to the proportion of wealth, of which it is in no case a precise measure, and in ordinary cases a very unfit one. But notwithstanding the imperfection of the rule as applied to the relative wealth and contributions of the States, it is evidently the least objectionable among the practicable rules, and had too recently obtained the general sanction of America, not to have found a ready preference with the convention.

All this is admitted, it will perhaps be said; but does it follow, from an admission of numbers for the measure of representation, or of slaves combined with free citizens as a ratio of taxation, that slaves ought to be included in the numerical rule of representation?[1] Slaves are considered as property, not as persons. They ought therefore to be comprehended in estimates of taxation which are founded on property, and to be excluded from representation which is regulated by a census of persons. This is the objection, as I understand it, stated in its full force. I shall be equally candid in stating the reasoning which may be offered on the opposite side.

"We subscribe to the doctrine," might one of our Southern brethren observe, "that representation relates more immediately to persons and taxation more immediately to property, and we join in the application of this distinction to the case of our slaves. But we must deny the fact that slaves are considered merely as property, and in no respect whatever as persons. The true state of the case is that they partake of both these qualities: being considered by our laws, in some respects, as persons, and in other respects as property. In being compelled to labor, not for himself, but for a master; in being vendible by one master to another master; and in being subject at all times to be

See No. 42.

[1] On the subject of what has passed into history as the "Federal Number," see "Slave Representation, by Boreas," 1812; Carey's "Calm Address to the People of the Eastern States on the Subject of the Representation of Slaves," 1814, and the amendments proposed by the Hartford convention in the Appendix.—EDITOR.

[2] See also Hamilton's speech in the New York convention (Elliot's "Debates," ii. 237).—EDITOR.

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restrained in his liberty and chastised in his body, by the capricious will of another, the slave may appear to be degraded from the human rank, and classed with those irrational animals which fall under the legal denomination of property. In being protected on the other hand, in his life and in his limbs, against the violence of all others, even the master of his labor and his liberty; and in being punishable himself for all violence committed against others —the slave is no less evidently regarded by the law as a member of the society, not as a part of the irrational creation; as a moral person, not as a mere article of property. The federal Constitution, therefore, decides with great propriety on the case of our slaves, when it views them in the mixed character of persons and of property. This is in fact their true character. It is the character bestowed on them by the laws under which they live; and it will not be denied that these are the proper criterion; because it is only under the pretext that the laws have transformed the negroes into subjects of property that a place is disputed them in the computation of numbers; and it is admitted that, if the laws were to restore the rights which have been taken away, the negroes could no longer be refused an equal share of representation with the other inhabitants.

"This question may be placed in another light. It is agreed on all sides that numbers are the best scale of wealth and taxation, as they are the only proper scale of representation. Would the convention have been impartial or consistent, if they had rejected the slaves from the list of inhabitants when the shares of representation were to be calculated, and inserted them on the lists when the tariff of contributions was to be adjusted? Could it be reasonably expected that the Southern States would concur in a system which considered their slaves in some degree as men when burdens were to be imposed, but refused to consider them in the same light when advantages were to be conferred? Might not some surprise also be expressed that those who reproach the Southern States with the barbarous policy of considering as property a part of their human brethren, should themselves contend that the government to which all the States are to be parties ought to consider this unfortunate race more completely in the unnatural light of property than the very laws of which they complain?

"It may be replied, perhaps, that slaves are not included in the estimate of representatives in any of the States possessing them. They neither vote themselves nor increase the votes of their masters. Upon what principle, then, ought they to be taken into the

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federal estimate of representation? In rejecting them altogether, the Constitution would, in this respect, have followed the very laws which have been appealed to as the proper guide.

"This objection is repelled by a single observation. It is a fundamental principle of the proposed Constitution that, as the aggregate number of representatives allotted to the several States is to be determined by a federal rule, founded on the aggregate number of inhabitants, so the right of choosing this allotted number in each State is to be exercised by such part of the inhabitants as the State itself may designate. The qualifications on which the right of suffrage depend are not, perhaps, the same in any two States. In some of the States the difference is very material. In every State a certain proportion of inhabitants are deprived of this right by the constitution of the State who will be included in the census by which the federal Constitution apportions the representatives. In this point of view the Southern States might retort the complaint, by insisting that the principle laid down by the convention required that no regard should be had to the policy of particular States toward their own inhabitants; and, consequently, that the slaves, as inhabitants, should have been admitted into the census according to their full number, in like manner with other inhabitants, who, by the policy of other States, are not admitted to all the rights of citizens. A rigorous adherence, however, to this principle is waived by those who would be gainers by it. All that they ask is that equal moderation be shown on the other side. Let the case of the slaves be considered, as it is in truth, a peculiar one. Let the compromising expedient of the Constitution be mutually adopted, which regards them as inhabitants, but as debased by servitude below the equal level of free inhabitants; which regards the *slave* as divested of two-fifths of the *man*.[1]

[1] Since the freeing and admitting of the slave to citizenship, this two-fifths idea has of course entirely disappeared, and the negro is counted as a full man. By the XIVth Amendment, any state depriving the freedman of his vote lost a corresponding degree of representation; the theory being that this would secure to the negro his rights of citizenship, because the southern states would not choose to forego the large loss of representation which his disfranchisement would involve. The south obtains the same result, however, first by the suppression of the negro vote, and more lately, with less completeness but with greater nominal fairness, by the introduction of educational restrictions which the election officers use to exclude the ballots of negroes. The whole history of the federal attempts to solve the negro problem for the south is a history of the folly of national attempts to destroy the home rule principle which is essentially the theory of American institutions. Far from achieving any good, such efforts have manifestly made the problem more difficult.—EDITOR.

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"After all, may not another ground be taken on which this article of the Constitution will admit of a still more ready defense? We have hitherto proceeded on the idea that representation related to persons only, and not at all to property. But is it a just idea? Government is instituted no less for protection of the property, than of the persons, of individuals. The one as well as the other, therefore, may be considered as represented by those who are charged with the government. Upon this principle it is that in several of the States, and particularly in the State of New York, one branch of the government is intended more especially to be the guardian of property, and is accordingly elected by that part of the society which is most interested in this object of government.[1] In the federal Constitution, this policy does not prevail. The rights of property are committed into the same hands with the personal rights. Some attention ought, therefore, to be paid to property in the choice of those hands.

"For another reason, the votes allowed in the federal legislature to the people of each State ought to bear some proportion to the comparative wealth of the States. States have not, like individuals, an influence over each other arising from superior advantages of fortune. If the law allows an opulent citizen but a single vote in the choice of his representative, the respect and consequence which he derives from his fortunate situation very frequently guide the votes of others to the objects of his choice; and through this imperceptible channel the rights of property are conveyed into the public representation. A State possesses no such influence over other States.[2] It is not probable that the richest State in the Confederacy will ever influence the choice of a single representative in any other State.[3] Nor will the representatives of the larger and

[1] The qualification of the members of the Senate of New York, by the constitution of 1777, was a freehold, and they were elected only by voters having a freehold of the value of £100 over and above all debts charged thereon.—EDITOR.

[2] This is quite true, if we simply consider the states as states. But with the growth of great commercial and manufacturing centers there has come what is a little different. The collection of vast sums of money from such sections as New England and Pennsylvania, whenever a campaign involving a tariff issue is to the front, is not merely matter of public knowledge, but even of boast with the party leaders who are to disburse the corruption fund in the "doubtful" states. Into the same category fall the enormous amounts collected in 1896 from all the moneyed centers to fight the silver issue in the south and west. A more curious instance still was that of the funds collected in the east and south by the two great forces of abolition and slavery to carry on the struggle for supremacy in the days of "bleeding Kansas."—EDITOR.

[3] It was a brag of the extreme protective interest that by a liberal use

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richer States possess any other advantage in the federal legislature, over the representatives of other States, than what may result from their superior number alone. As far, therefore, as their superior wealth and weight may justly entitle them to any advantage, it ought to be secured to them by a superior share of representation. The new Constitution is, in this respect, materially different from the existing Confederation, as well as from that of the United Netherlands and other similar confederacies. In each of the latter the efficacy of the federal resolutions depends on the subsequent and voluntary resolutions of the states composing the union. Hence the states, though possessing an equal vote in the public councils, have an unequal influence, corresponding with the unequal importance of these subsequent and voluntary resolutions. Under the proposed Constitution, the federal acts will take effect without the necessary intervention of the individual States. They will depend merely on the majority of votes in the federal legislature, and consequently each vote, whether proceeding from a larger or smaller State, or a State more or less wealthy or powerful, will have an equal weight and efficacy, in the same manner as the votes individually given in a State legislature, by the representatives of unequal counties or other districts, have each a precise equality of value and effect; or if there be any difference in the case, it proceeds from the difference in the personal character of the individual representative rather than from any regard to the extent of the district from which he comes."

Such is the reasoning which an advocate for the Southern interests might employ on this subject; and although it may appear to be a little strained in some points, yet, on the whole, I must confess that it fully reconciles me to the scale of representation which the convention have established.

In one respect, the establishment of a common measure for representation and taxation will have a very salutary effect. As the accuracy of the census to be obtained by the Congress will necessarily depend, in a considerable degree, on the disposition, if not on the co-operation, of the States, it is of great importance that the States should feel as little bias as possible to swell or to reduce the amount of their numbers. Were their share of representation alone to be governed by this rule, they would have an interest in exaggerating their inhabitants. Were the rule to decide their share of taxation alone, a contrary temptation would prevail.[1]

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of money they defeated the re-election of Wilson of West Virginia, because of his share in the Wilson tariff bill of 1894.—EDITOR.

[1] It was charged that the national census of 1890 materially underrated

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By extending the rule to both objects the States will have opposite interests, which will control and balance each other and produce the requisite impartiality. PUBLIUS.

No. 55 [54]. (*Independent Journal*, February 13, 1788.) Hamilton (?)

SIZE OF THE HOUSE OF REPRESENTATIVES.

Importance attached to this subject—Difficulty of determining the proper number—Small states require smaller ratios—Limited powers of Congress do not demand a numerous representation—Various objections considered and answered—Sources of danger considered.

To the People of the State of New York:

The number of which the House of Representatives is to consist forms another and a very interesting point of view, under which this branch of the federal legislature may be contemplated. Scarce any article, indeed, in the whole Constitution seems to be rendered more worthy of attention, by the weight of character and the apparent force of argument with which it has been assailed. The charges exhibited against it are, first, that so small a number of representatives will be an unsafe depositary of the public interests; secondly, that they will not possess a proper knowledge of the local circumstances of their numerous constituents; thirdly, that they will be taken from that class of citizens which will sympathize least with the feelings of the mass of the people, and be most likely to aim at a permanent elevation of the few on the depression of the many; fourthly, that defective as the number will be in the first instance, it will be more and more disproportionate by the increase of the people and the obstacles which will prevent a correspondent increase of the representatives.

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the population of New York city, thus reducing her quota of representatives in the House of Representatives. A police census taken immediately afterward seemed to prove the assertion. As the census was prepared under Republican auspices and New York city was strongly Democratic, the partisan object was obvious.—EDITOR.

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In general it may be remarked on this subject that no political problem is less susceptible of a precise solution than that which relates to the number most convenient for a representative legislature; nor is there any point on which the policy of the several States is more at variance, whether we compare their legislative assemblies directly with each other, or consider the proportions which they respectively bear to the number of their constituents. Passing over the difference between the smallest and largest States, as Delaware, whose most numerous branch consists of twenty-one representatives, and Massachusetts, where it amounts to between three and four hundred, a very considerable difference is observable among States nearly equal in population. The number of representatives in Pennsylvania is not more than one-fifth of that in the State last mentioned. New York, whose population is to that of South Carolina as six to five, has little more than one-third of the number of representatives. As great a disparity prevails between the States of Georgia and Delaware or Rhode Island. In Pennsylvania the representatives do not bear a greater proportion to their constituents than of one for every four or five thousand. In Rhode Island they bear a proportion of at least one for every thousand. And according to the constitution of Georgia, the proportion may be carried to one to every ten electors; and must unavoidably far exceed the proportion in any of the other States.

Another general remark to be made is that the ratio between the representatives and the people ought not to be the same where the latter are very numerous as where they are very few. Were the representatives in Virginia to be regulated by the standard in Rhode Island, they would, at this time, amount to between four and five hundred; and twenty or thirty years hence, to a thousand. On the other hand, the ratio of Pennsylvania, if applied to the State of Delaware, would reduce the representative assembly of the latter to seven or eight members. Nothing can be more fallacious than to found

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our political calculations on arithmetical principles. Sixty or seventy men may be more properly trusted with a given degree of power than six or seven. But it does not follow that six or seven hundred would be proportionately a better depositary. And if we carry on the supposition to six or seven thousand, the whole reasoning ought to be reversed. The truth is that, in all cases, a certain number at least seems to be necessary to secure the benefits of free consultation and discussion, and to guard against too easy a combination for improper purposes; as, on the other hand, the number ought at most to be kept within a certain limit, in order to avoid the confusion and intemperance of a multitude. In all very numerous assemblies, of whatever character composed, passion never fails to wrest the scepter from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.

It is necessary also to recollect here the observations which were applied to the case of biennial elections. For the same reason that the limited powers of the Congress, and the control of the State legislatures, justify less frequent elections than the public safety might otherwise require, the members of the Congress need be less numerous than if they possessed the whole power of legislation and were under no other than the ordinary restraints of other legislative bodies.

With these general ideas in our minds, let us weigh the objections which have been stated against the number of members proposed for the House of Representatives. It is said, in the first place, that so small a number cannot be safely trusted with so much power.

The number of which this branch of the legislature is to consist at the outset of the government will be sixty-five. Within three years a census is to be taken, when the number may be augmented to one for every thirty thousand inhabitants; and within every successive period of ten years the census is to be renewed, and augmentations may continue to be made under the above limitation. It will not be thought an extravagant conjecture that the first census will, at the rate of one for every thirty thousand, raise the number of representatives to at least one hundred. Estimat-

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ing the negroes in the proportion of three-fifths, it can scarcely be doubted that the population of the United States will by that time, if it does not already, amount to three millions. At the expiration of twenty-five years, according to the computed rate of increase, the number of representatives will amount to two hundred; and of fifty years, to four hundred. This is a number which, I presume, will put an end to all fears arising from the smallness of the body. I take for granted here what I shall, in answering the fourth objection, hereafter show, that the number of representatives will be augmented from time to time in the manner provided by the Constitution. On a contrary supposition, I should admit the objection to have very great weight indeed.

The true question to be decided then is, whether the smallness of the number, as a temporary regulation, be dangerous to the public liberty? Whether sixty-five members for a few years, and hundred or two hundred for a few more, be a safe depositary for a limited and well-guarded power of legislating for the United States? I must own that I could not give a negative answer to this question, without first obliterating every impression which I have received with regard to the present genius of the people of America, the spirit which actuates the State legislatures, and the principles which are incorporated with the political character of every class of citizens. I am unable to conceive that the people of America, in their present temper, or under any circumstances which can speedily happen, will choose, and every second year repeat the choice of, sixty-five or a hundred men who would be disposed to form and pursue a scheme of tyranny or treachery. I am unable to conceive that the State legislatures, which must feel so many motives to watch, and which possess so many means of counteracting the federal legislature, would fail either to detect or to defeat a conspiracy of the latter against the liberties of their common constituents. I am equally unable to conceive that there are at this time, or can be in any short time, in the United States, any sixty-five or a hundred men capable of recommending themselves to the choice of the people at large, who would either desire or dare, within the short space of two years, to betray the solemn trusted committed to them. What change of circumstances, time, and a fuller population of our country may produce, requires a prophetic spirit to declare, which makes no part of my pretensions. But judging from the circumstances now before us, and from the probable state of them within a moderate period of time, I must pronounce that the liberties of America cannot be unsafe in the number of hands proposed by the federal Constitution.

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From what quarter can the danger proceed? Are we afraid of foreign gold? If foreign gold could so easily corrupt our federal rulers and enable them to ensnare and betray their constituents, how has it happened that we are at this time a free and independent nation? The Congress which conducted us through the Revolution was a less numerous body than their successors will be; they were not chosen by, nor responsible to, their fellow-citizens at large; though appointed from year to year, and recallable at pleasure, they were generally continued for three years, and, prior to the ratification of the federal articles, for a still longer term. They held their consultations always under the veil of secrecy; they had the sole transaction of our affairs with foreign nations; through the whole course of the war, they had the fate of their country more in their hands than it is to be hoped will ever be the case with our future representatives; and from the greatness of the prize at stake, and the eagerness of the party which lost it, it may well be supposed that the use of other means than force would not have been scrupled. Yet we know by happy experience that the public trust was not betrayed; nor has the purity of our public councils in this particular ever suffered, even from the whispers of calumny.

Is the danger apprehended from the other branches of the federal government? But where are the means to be found by the President, or the Senate, or both? Their emoluments of office, it is to be presumed, will not, and without a previous corruption of the House of Representatives cannot, more than suffice for very different purposes; their private fortunes, as they must all be American citizens, cannot possibly be sources of danger. The only means, then, which they can possess will be in the dispensation of appointments. Is it here that suspicion rests her charge? Sometimes we are told that this fund of corruption is to be exhausted by the President in subduing the virtue of the Senate. Now, the fidelity of the other House is to be the victim. The improbability of such a mercenary and perfidious combina-

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tion of the several members of government, standing on as different foundations as republican principles will well admit, and at the same time accountable to the society over which they are placed, ought alone to quiet this apprehension. But, fortunately, the Constitution has provided a still further safeguard. The members of the Congress are rendered ineligible to any civil offices that may be created, or of which the emoluments may be increased, during the term of their election. No offices, therefore, can be dealt out to the existing members but such as may become vacant by ordinary casualties; and to suppose that these will be sufficient to purchase the guardians of the people, selected by the people themselves, is to renounce every rule by which events ought to be calculated, and to substitute an indiscriminate and unbounded jealousy, with which all reasoning must be vain. The sincere friends of liberty who give themselves up to the extravagancies of this passion are not aware of the injury they do their own cause. As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justifiy a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form. Were the pictures which have been drawn by the political jealousy of some among us, faithful likenesses of the human character, the inference would be that there is not sufficient virtue among men for self-government, and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.

See No. 77.

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No. 56 [55]. (*Independent Journal*, February 16, 1788.) Hamilton (?)

NECESSARY KNOWLEDGE IN THE REPRESENTATIVE CONSIDERED IN RELATION TO THE RATIO OF REPRESENTATION.

Objection that Congress will be too small to know the interests and wishes of its constituents considered—The representative ought to know the interests of his constituents—Objects of federal legislation—A few representatives will be sufficient—Taxation—Militia—The experience of Great Britain.

To the People of the State of New York:

The *second* charge against the House of Representatives is that it will be too small to possess a due knowledge of the interests of its constituents.

As this objection evidently proceeds from a comparison of the proposed number of representatives with the great extent of the United States, the number of their inhabitants, and the diversity of their interests, without taking into view at the same time the circumstances which will distinguish the Congress from other legislative bodies, the best answer that can be given to it will be a brief explanation of these peculiarities.

It is a sound and important principle that the representative ought to be acquainted with the interests and circumstances of his constituents. But this principle can extend no further than to those circumstances and interests to which the authority and care of the representative relate. An ignorance of a variety of minute and particular objects, which do not lie within the compass of legislation, is consistent with every attribute necessary to a due performance of the legislative trust. In determining the extent of information required in the exercise of a particular authority, recourse then must be had to the objects within the purview of that authority.

What are to be the objects of federal legislation? Those which are of most importance, and which seem most to require local knowledge, are commerce, taxation, and the militia.

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A proper regulation of commerce requires much information, as has been elsewhere remarked; but as far as this information relates to the laws and local situation of each individual State, a very few representatives would be very sufficient vehicles of it to the federal councils.

Taxation will consist, in a great measure, of duties which will be involved in the regulation of commerce. So far the preceding remark is applicable to this object. As far as it may consist of internal collections, a more diffusive knowledge of the circumstances of the State may be necessary. But will not this also be possessed in sufficient degree by a very few intelligent men, diffusively elected within the State? Divide the largest State into ten or twelve districts, and it will be found that there will be no peculiar local interests in either which will not be within the knowledge of the representative of the district. Besides this source of information, the laws of the State, framed by representatives from every part of it, will be almost of themselves a sufficient guide. In every State there have been made, and must continue to be made, regulations on this subject which will, in many cases, leave little more to be done by the federal legislature than to review the different laws and reduce them in one general act. A skillful individual in his closet, with all the local codes before him, might compile a law on some subjects of taxation for the whole Union without any aid from oral information, and it may be expected that whenever internal taxes may be necessary, and particularly in cases requiring uniformity throughout the States, the more simple objects will be preferred. To be fully sensible of the facility which will be given to this branch of federal legislation by the assistance of the State codes, we need only suppose for a moment that this or any other State were divided into a number of parts, each having and exercising within itself a power of local legislation. Is it not evident that a degree of local information and preparatory labor would be found in the several volumes of their proceedings which would very much shorten the labors of the general legislature,

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and render a much smaller number of members sufficient for it?

The federal councils will derive great advantage from another circumstance: The representatives of each State will not only bring with them a considerable knowledge of its laws, and a local knowledge of their respective districts, but will probably in all cases have been members, and may even at the very time be members, of the State legislature, where all the local information and interests of the State are assembled, and from whence they may easily be conveyed by a very few hands into the legislature of the United States.

The observations made on the subject of taxation apply with greater force to the case of the militia. For however different the rules of discipline may be in different States, they are the same throughout each particular State; and depend on circumstances which can differ but little in different parts of the same State.[1]

The attentive reader will discern that the reasoning here used, to prove the sufficiency of a moderate number of representatives, does not in any respect contradict what was urged on another occasion with regard to the extensive information which the representatives ought to possess, and the time that might be necessary for acquiring it. This information, so far as it may relate to local objects, is rendered necessary and difficult, not by a difference of laws and local circumstances within a single State, but of those among different States. Taking each State by itself, its laws are the same, and its interests but little diversified. A few men, therefore, will possess all the knowledge requisite for a proper representation of them. Were the

See No. 53.

[1] In the text of the collected edition of 1788 this paragraph reads: "With regard to the regulation of the militia, there are scarcely any circumstances in reference to which local knowledge can be said to be necessary. The general face of the country, whether mountainous or level, most fit for the operations of infantry or cavalry, is almost the only consideration of this nature that can occur. The art of war teaches general principles of organization, movement, and discipline, which apply universally."—EDITOR.

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interests and affairs of each individual State perfectly simple and uniform, a knowledge of them in one part would involve a knowledge of them in every other, and the whole State might be competently represented by a single member taken from any part of it. On a comparison of the different States together, we find a great dissimilarity in their laws, and in many other circumstances connected with the objects of federal legislation, with all of which the federal representatives ought to have some acquaintance. Whilst a few representatives, therefore, from each State, may bring with them a due knowledge of their own State, every representative will have much information to acquire concerning all the other States. The changes of time, as was formerly remarked, on the comparative situation of the different States, will have an assimilating effect. The effect of time on the internal affairs of the States, taken singly, will be just the contrary. At present some of the States are little more than a society of husbandmen. Few of them have made much progress in those branches of industry which give a variety and complexity to the affairs of a nation. These, however, will in all of them be the fruits of a more advanced population, and will require, on the part of each State, a fuller representation. The foresight of the convention has accordingly taken care that the progress of population may be accompanied with a proper increase of the representative branch of the government.

The experience of Great Britain, which presents to mankind so many political lessons, both of the monitory and exemplary kind, and which has been frequently consulted in the course of these inquiries, corroborates the result of the reflections which we have just made. The number of inhabitants in the two kingdoms of England and Scotland cannot be stated at less than 8,000,000. The representatives of these 8,000,000 in the House of Commons amount to 558. Of this number, one-ninth are elected by 364 persons, and one-half by 5723 persons.* It cannot be supposed that the half thus elected, and who do not even reside among the

* Burgh's "Political Disquisitions."—PUBLIUS.

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people at large, can add anything either to the security of the people against the government, or to the knowledge of their circumstances and interests in the legislative councils. On the contrary, it is notorious that they are more frequently the representatives and instruments of the executive magistrate than the guardians and advocates of the popular rights. They might, therefore, with great propriety, be considered as something more than a mere deduction from the real representatives of the nation. We will, however, consider them in this light alone, and will not extend the deduction to a considerable number of others, who do not reside among their constituents, are very faintly connected with them, and have very little particular knowledge of their affairs. With all these concessions, 279 persons only will be the depositary of the safety, interest, and happiness of 8,000,000—that is to say, there will be one representative only to maintain the rights and explain the situation of *twenty-eight thousand six hundred and seventy* constituents, in an assembly exposed to the whole force of executive influence, and extending its authority to every object of legislation within a nation whose affairs are in the highest degree diversified and complicated. Yet it is very certain, not only that a valuable portion of freedom has been preserved under all these circumstances, but that the defects in the British code are chargeable, in a very small proportion, on the ignorance of the legislalature concerning the circumstances of the people. Allowing to this case the weight which is due to it, and comparing it with that of the House of Representatives as above explained, it seems to give the fullest assurance that a representative for every *thirty thousand inhabitants* will render the latter both a safe and competent guardian of the interests which will be confided to it.

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No. 57 [56]. (*New York Packet*, February 19, 1788.) Hamilton (?)

UNLIKELIHOOD THAT THE HOUSE OF REPRESENTATIVES WILL ELEVATE THE FEW ABOVE THE MANY.

This objection, in principle, strikes at the root of representative government—Members elected by and taken from all classes—Securities to insure fidelity of members enumerated—Provisions for electing members, and their qualifications, like those of state officers—The relative numbers of the constituencies no reason for approval of state and disapproval of federal system—The doctrine neither reasonable nor admissible—It is not sustained by facts—Examples from House of Commons and from the states.

To the People of the State of New York:

The *third* charge against the House of Representatives is that it will be taken from that class of citizens which will have least sympathy with the mass of the people and be most likely to aim at an ambitious sacrifice of the many to the aggrandizement of the few.

Of all the objections which have been framed against the federal Constitution, this is perhaps the most extraordinary. Whilst the objection itself is leveled against a pretended oligarchy, the principle of it strikes at the very root of republican government.

The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust. The elective mode of obtaining rulers is the characteristic policy of republican government. The means relied on in this form of government for preventing their degeneracy are numerous and various. The most effectual one is such a limitation of the term of appointments as will maintain a proper responsibility to the people.

Let me now ask what circumstance there is in the constitution of the House of Representatives that violates the principles of republican government, or favors the

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elevation of the few on the ruins of the many? Let me ask whether every circumstance is not, on the contrary, strictly conformable to these principles, and scrupulously impartial to the rights and pretensions of every class and description of citizens?

Who are to be the electors of the federal representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of the people of the United States. They are to be the same who exercise the right in every State of electing the corresponding branch of the legislature of the State.

Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.

If we consider the situation of the men on whom the free suffrages of their fellow-citizens may confer the representative trust, we shall find it involving every security which can be devised or desired for their fidelity to their constituents.

In the first place, as they will have been distinguished by the preference of their fellow-citizens, we are to presume that in general they will be somewhat distinguished also by those qualities which entitle them to it, and which promise a sincere and scrupulous regard to the nature of their engagements.

In the second place, they will enter into the public service under circumstances which cannot fail to produce a temporary affection at least to their constituents. There is in every breast a sensibility to marks of honor, of favor, of esteem, and of confidence, which, apart from all considerations of interest, is some pledge for grateful and benevolent returns. Ingratitude is a common topic of declamation against human nature; and it must be

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confessed that instances of it are but too frequent and flagrant, both in public and in private life. But the universal and extreme indignation which it inspires is itself a proof of the energy and prevalence of the contrary sentiment.

In the third place, those ties which bind the representative to his constituents are strengthened by motives of a more selfish nature. His pride and vanity attach him to a form of government which favors his pretensions and gives him a share in its honors and distinctions. Whatever hopes or projects might be entertained by a few aspiring characters, it must generally happen that a great proportion of the men deriving their advancement from their influence with the people would have more to hope from a preservation of the favor than from innovations in the government subversive of the authority of the people.

All these securities, however, would be found very insufficient without the restraint of frequent elections. Hence, in the fourth place, the House of Representatives is so constituted as to support in the members an habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode of their elevation can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from they were raised; there forever to remain unless a faithful discharge of their trust shall have established their title to a renewal of it.

I will add, as a fifth circumstance in the situation of the House of Representatives, restraining them from oppressive measures, that they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society. This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interests and sympathy of sentiments of which

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few governments have furnished examples, but without which every government degenerates into tyranny. If it be asked what is to restrain the House of Representatives from making legal discriminations in favor of themselves and a particular class of the society, I answer: the genius of the whole system; the nature of just and constitutional laws; and above all, the vigilant and manly spirit which actuates the people of America —a spirit which nourishes freedom, and in return is nourished by it.

If this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate anything but liberty.

Such will be the relation between the House of Representatives and their constituents. Duty, gratitude, interest, ambition itself, are the cords by which they will be bound to fidelity and sympathy with the great mass of the people. It is possible that these may all be insufficient to control the caprice and wickedness of man. But are they not all that government will admit and that human prudence can devise? Are they not the genuine and the characteristic means by which republican government provides for the liberty and happiness of the people? Are they not the identical means on which every State government in the Union relies for the attainment of these important ends? What, then, are we to understand by the objection which this paper has combated? What are we to say to the men who profess the most flaming zeal for republican government, yet boldly impeach the fundamental principle of it; who pretend to be champions for the right and the capacity of the people to choose their own rulers, yet maintain that they will prefer those only who will immediately and infallibly betray the trust committed to them?

Were the objection to be read by one who had not seen the mode prescribed by the Constitution for the choice of representatives, he could suppose nothing less than that some unreasonable qualification of property was

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annexed to the right of suffrage; or that the right of eligibility was limited to persons of particular families or fortunes; or at least that the mode prescribed by the State constitutions was, in some respect or other, very grossly departed from. We have seen how far such a supposition would err, as to the two first points. Nor would it, in fact, be less erroneous as to the last. The only difference discoverable between the two cases is that each representative of the United States will be elected by five or six thousand citizens; whilst, in the individual States, the election of a representative is left to about as many hundreds. Will it be pretended that this difference is sufficient to justify an attachment to the State governments, and an abhorrence to the federal government? If this be the point on which the objection turns, it deserves to be examined.

Is it supported by *reason?* This cannot be said without maintaining that five or six thousand citizens are less capable of choosing a fit representative, or more liable to be corrupted by an unfit one, than five or six hundred. Reason, on the contrary, assures us that as in so great a number a fit representative would be most likely to be found, so the choice would be less likely to be diverted from him by the intrigues of the ambitious or the bribes of the rich.

Is the *consequence* from this doctrine admissible? If we say that five or six hundred citizens are as many as can jointly exercise their right of suffrage, must we not deprive the people of the immediate choice of their public servants, in every instance where the administration of the government does not require as many of them as will amount to one for that number of citizens?

Is the doctrine warranted by *facts?* It was shown in the last paper that the real representation in the British House of Commons very little exceeds the proportion of one for every thirty thousand inhabitants. Besides a variety of powerful causes not existing here, and which favor in that country the pretensions of rank and wealth, no person is eligible as a representative of a county unless he possess real estate of the clear value of six hundred pounds sterling per year; nor of a city or borough, unless he

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possess a like estate of half that annual value. To this qualification on the part of the county representatives is added another on the part of the county electors, which restrains the right of suffrage to persons having a freehold estate of the annual value of more than twenty pounds sterling, according to the present rate of money. Notwithstanding these unfavorable circumstances, and notwithstanding some very unequal laws in the British code, it cannot be said that the representatives of the nation have elevated the few on the ruins of the many.

But we need not resort to foreign experience on this subject. Our own is explicit and decisive. The districts in New Hampshire in which the senators are chosen immediately by the people are nearly as large as will be necessary for her representatives in the Congress. Those of Massachusetts are larger than will be necessary for that purpose; and those of New York still more so. In the last State the members of Assembly for the cities and counties of New York and Albany are elected by very nearly as many voters as will be entitled to a representative in the Congress, calculating on the number of sixty-five representatives only. It makes no difference that in these senatorial districts and counties a number of representatives are voted for by each elector at the same time. If the same electors at the same time are capable of choosing four or five representatives, they cannot be incapable of choosing one. Pennsylvania is an additional example. Some of her counties, which elect her State representatives, are almost as large as her districts will be by which her federal representatives will be elected. The city of Philadelphia is supposed to contain between fifty and sixty thousand souls. It will therefore form nearly two districts for the choice of federal representatives. It forms, however, but one county, in which every elector votes for each of its representatives in the State legislature. And what may appear to be still more directly to our purpose, the whole city actually elects a *single member* for the executive council. This is the case in all the other counties of the State.

Are not these facts the most satisfactory proofs of the fallacy which has been employed against the branch of the federal government under consideration? Has it appeared on trial that the senators of New Hampshire, Massachusetts, and New York, or the executive council of Pennsylvania, or the members of the Assembly in the two last States, have betrayed any peculiar disposition to sacrifice the many to the few, or are in any respect less worthy of their places than the representatives and magistrates appointed in other States by very small divisions of the people?

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But there are cases of a stronger complexion than any which I have yet quoted. One branch of the legislature of Connecticut is so constituted that each member of it is elected by the whole State. So is the governor of that State, of Massachusetts, and of this State, and the president of New Hampshire. I leave every man to decide whether the result of any one of these experiments can be said to countenance a suspicion that a diffusive mode of choosing representatives of the people tends to elevate traitors and to undermine the public liberty. PUBLIUS.

No. 58 [57]. (*Independent Journal*, February 20, 1788.) Hamilton (?)

FUTURE AUGMENTATION OF THE HOUSE OF REPRESENTATIVES.

The state constitutions compared on this point with the one proposed —The practice of the state governments— The organization of Congress will induce watchfulness— The large states will control the small—Objections that the Senate will prevent augmentation answered— The constitutional resource of refusing supplies by the House—Reasons against a numerous House—Objection to a majority being a quorum, of which a majority can enact laws, considered.

To the People of the State of New York:

The remaining charge against the House of Representatives which I am to examine is grounded on a supposition that the number of members will not be augmented from time to time, as the progress of population may demand.

It has been admitted that this objection, if well supported, would have great weight. The following observations will show that, like most other objections against the Constitution, it can only proceed from a partial view of the subject, or from a jealousy which discolors and disfigures every object which is beheld.

1. Those who urge the objection seem not to have recollected that the federal Constitution will not suffer by a comparison with the State constitutions, in the security provided for a gradual augmentation of the number of representatives. The number which is to prevail in the first instance is declared to be temporary.

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Its duration is limited to the short term of three years. Within every successive term of ten years a census of inhabitants is to be repeated. The unequivocal objects of these regulations are, first, to readjust from time to time the apportionment of representatives to the number of inhabitants, under the single exception that each State shall have one representative at least; secondly, to augment the number of representatives at the same periods, under the sole limitation that the whole number shall not exceed one for every thirty thousand inhabitants. If we review the constitutions of the several States, we shall find that some of them contain no determinate regulations on this subject, that others correspond pretty much on this point with the federal Constitution, and that the most effectual security in any of them is resolvable into a mere directory provision.

2. As far as experience has taken place on this subject, a gradual increase of representatives under the State constitutions has at least kept pace with that of the constituents, and it appears that the former have been as ready to concur in such measures as the latter have been to call for them.

3. There is a peculiarity in the federal Constitution which insures a watchful attention in a majority both of the people and of their representatives to a constitutional augmentation of the latter. The peculiarity lies in this, that one branch of the legislature is a representation of citizens, the other of the States; in the former, consequently, the larger States will have most weight; in the latter, the advantage will be in favor of the smaller States. From this circumstance it may with certainty be inferred that the larger States will be strenuous advocates for increasing the number and weight of that part of the legislature in which their influence predominates. And it so happens that four only of the largest will have a majority of the whole vote in the House of Representatives. Should the representatives or people, therefore, of the smaller States oppose at any time a reasonable addition of members, a coalition of a very few States will

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be sufficient to overrule the opposition; a coalition which, notwithstanding the rivalship and local prejudices which might prevent it on ordinary occasions, would not fail to take place, when not merely prompted by common interest, but justified by equity and the principles of the Constitution.

It may be alleged, perhaps, that the Senate would be prompted by like motives to an adverse coalition; and as their concurrence would be indispensable, the just and constitutional views of the other branch might be defeated. This is the difficulty which has probably created the most serious apprehensions in the jealous friends of a numerous representation. Fortunately it is among the difficulties which, existing only in appearance, vanish on a close and accurate inspection. The following reflections will, if I mistake not, be admitted to be conclusive and satisfactory on this point.

Notwithstanding the equal authority which will subsist between the two houses on all legislative subjects, except the originating of money bills, it cannot be doubted that the House, composed of the greater number of members, when supported by the more powerful States, and speaking the known and determined sense of a majority of the people, will have no small advantage in a question depending on the comparative firmness of the two houses.

This advantage must be increased by the consciousness felt by the same side of being supported in its demands by right, by reason, and by the Constitution; and the consciousness, on the opposite side, of contending against the force of all these solemn considerations.

It is farther to be considered that, in the gradation between the smallest and largest States, there are several which, though most likely in general to arrange themselves among the former, are too little removed in extent and population from the latter to second an opposition to their just and legitimate pretensions. Hence it is by no means certain that a majority of votes, even in the Senate, would be unfriendly to proper augmentations in the number of representatives.

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It will not be looking too far to add that the senators from all the new States may be gained over to the just views of the House of Representatives by an expedient too obvious to be overlooked. As these States will, for a great length of time, advance in population with peculiar rapidity, they will be interested in frequent reapportionments of the representatives to the number of inhabitants. The large States, therefore, who will prevail in the House of Representatives, will have nothing to do but to make reapportionments and augmentations, mutually conditions of each other; and the senators from all the most growing States will be bound to contend for the latter by the interest which their States will feel in the former.

These considerations seem to afford ample security on this subject, and ought alone to satisfy all the doubts and fears which have been indulged with regard to it. Admitting, however, that they should all be insufficient to subdue the unjust policy of the smaller States, or their predominant influence in the councils of the Senate, a constitutional and infallible resource still remains with the larger States, by which they will be able at all times to accomplish their just purposes. The House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government.[1] They, in a word, hold the purse—that powerful

[1] To examine at length the points on which the Senate and House have disagreed would be useless. But a few of the questions may be briefly noticed, that some idea may be given of the actual value of the Senate, both as a check and as a clog to the more popular action of the House. In 1794 the House attempted to prohibit trade with England, but the resolution was negatived by the Senate. The latter ratified the Jay treaty, which the former hotly opposed. In 1819 the House voted for the amendment admitting Missouri as a free state, and the Senate rejected it; a very similar action occurring in 1820. In the same year (1819) the former passed a protective tariff, which was negatived by the latter, and in 1826 the Senate defeated a bill of even greater protective tendency. In 1837 the Senate "recognized" the independence of Texas, but the House refused to concur. Opposite action was taken by the two bodies on the bill for an Independent Treasury. The battle over the Wilmot proviso, and its prototypes, was several times dodged by the Senate, but that body was unfavorable to the amendment. The Senate surrendered to the House in the bill organizing the territories of New

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instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.

But will not the House of Representatives be as much interested as the Senate in maintaining the government in its proper functions, and will they not therefore be unwilling to stake its existence or its reputation on the pliancy of the Senate? Or, if such a trial of firmness between the two branches were hazarded, would not the one be as likely first to yield as the other? These questions will create no difficulty with those who reflect that in all cases the smaller the number, and the more perma-

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Mexico and California in 1848. The struggle over the Kansas-Nebraska difficulties was long and the disagreements frequent; the Senate being consistently favorable to the extension of, or non-interference with slavery, and the House fluctuating in its attitude. In 1863 the Senate passed a constitutional amendment abolishing slavery, but it failed to get the necessary vote in the House. The most recent disagreements of moment have been on the so-called "force bill," and on the silver purchase law, in both of which the Senate has shown itself a conservative force, but one ultimately responsive to public opinion.

"This much, however, may be claimed for it, that it has been, and is, on the whole, a steadying and moderating power. One cannot say, in the language of European politics, that it has represented aristocratic principles, or anti-popular principles, or even conservative principles. Each of the great historic parties has in turn commanded a majority in it, and the difference between their strength has during the last decade been but slight. On none of the great issues that have divided the nation has the Senate been, for any long period, decidedly opposed to the other House of Congress. It showed no more capacity than the House for grappling with the problems of slavery extension. It was scarcely less ready than the House to strain the Constitution by supporting Lincoln in the exercise of the so-called war powers, or subsequently by cutting down presidential authority in the struggle between Congress and Andrew Johnson. All the fluctuations of public opinion tell upon it, nor does it venture, any more than the House, to confront a popular impulse, because it is, equally with the House, subject to the control of the great

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nent and conspicuous the station, of men in power, the stronger must be the interest which they will individually feel in whatever concerns the government. Those who represent the dignity of their country in the eyes of other nations will be particularly sensible to every prospect of public danger or of dishonorable stagnation in public affairs. To those causes we are to ascribe the continual triumph of the British House of Commons over the other branches of the government, whenever the engine of a money bill has been employed. An absolute inflexibility on the side of the latter, although it could not have failed to involve every department of the state in the general confusion, has neither been apprehended nor experienced. The utmost degree of firmness that can be displayed by the federal Senate or President will not be more than equal to a resistance in which they will be supported by constitutional and patriotic principles.

In this review of the constitution of the House of Representatives, I have passed over the circumstances of

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parties, which seek to use while they obey the dominant sentiment of the hour.

"But the fluctuations of opinion tell on it less energetically than on the House of Representatives. They reach it slowly and gradually, owing to the system which renews it by one-third every second year, so that it sometimes happens that before the tide has risen to the top of the flood in the Senate it has already begun to ebb in the country. The Senate has been a stouter bulwark against agitation, not merely because a majority of the senators have always four years of membership before them, within which period public feeling may change, but also because the senators have been individually stronger men than the representatives. They are less democratic, not in opinion, but in temper, because they have more self-confidence, because they have more to lose, because experience has taught them how fleeting a thing popular sentiment is, and how useful a thing continuity in policy is. The Senate has therefore usually kept its head better than the House of Representatives. It has expressed more adequately the judgment, as contrasted with the emotion, of the nation. In this sense it does constitute a 'check and balance' in the Federal government. Of the three great functions which the Fathers of the Constitution meant it to perform, the first, that of securing the rights of the smaller States, is no longer important, because the extent of State rights has been now well settled; while the second, that of advising or controlling the Executive in appointments as well as in treaties, has given rise to evils almost commensurate with its benefits. But the third duty is still well discharged, for 'the propensity of a single and numerous assembly to yield to the impulse of sudden and violent passions' is restrained."—Bryce's "American Commonwealth."—EDITOR.

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economy, which, in the present state of affairs, might have had some effect in lessening the temporary number of representatives, and a disregard of which would probably have been as rich a theme of declamation against the Constitution as has been shown by the smallness of the number proposed. I omit also any remarks on the difficulty which might be found, under present circumstances, in engaging in the federal service a large number of such characters as the people will probably elect. One observation, however, I must be permitted to add on this subject as claiming, in my judgment, a very serious attention. It is, that in all legislative assemblies the greater the number composing them may be, the fewer will be the men who will in fact direct their proceedings.

See No. 53. In the first place, the more numerous an assembly may be, of whatever characters composed, the greater is known to be the ascendency of passion over reason. In the next place, the larger the number, the greater will be the proportion of members of limited information and of weak capacities. Now, it is precisely on characters of this description that the eloquence and address of the few are known to act with all their force. In the ancient republics, where the whole body of the people assembled in person, a single orator, or an artful statesman, was generally seen to rule with as complete a sway as if a scepter had been placed in his single hand. On the same principle, the more multitudinous a representative assembly may be rendered, the more it will partake of the infirmities incident to collective meetings of the people. Ignorance will be the dupe of cunning, and passion the slave of sophistry and declamation. The people can never err more than in supposing that by multiplying their representatives beyond a certain limit, they strengthen the barrier against the government of a few. Experience will forever admonish them that, on the contrary, *after securing a sufficient number for the purposes of safety, of local information, and of diffusive sympathy with the whole society*, they will counteract their own views by every addition to their represent-

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atives. The countenance of the government may become more democratic, but the soul that animates it will be more oligarchic. The machine will be enlarged, but the fewer, and often the more secret, will be the springs by which its motions are directed.

As connected with the objection against the number of representatives, may properly be here noticed that which has been suggested against the number made competent for legislative business. It has been said that more than a majority ought to have been required for a quorum; and in particular cases, if not in all, more than a majority of a quorum for a decision. That some advantages might have resulted from such a precaution cannot be denied. It might have been an additional shield to some particular interests, and another obstacle generally to hasty and partial measures. But these considerations are outweighed by the inconveniences in the opposite scale. In all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed. It would be no longer the majority that would rule: the power would be transferred to the minority.[1] Were the defensive privilege limited to particular cases, an interested minority might take advantage of it to screen themselves from equitable sacrifices to the general weal, or, in particular emergencies, to extort unreasonable indulgences. Lastly, it would facilitate and foster

[1] This had been successfully accomplished in 1776 in the Assembly of Pennsylvania, where a minority of the representatives had, by withdrawing, destroyed a quorum, and thus prevented all legislation. The same measure was attempted in 1787 by the minority of the same Assembly, to prevent the calling of a convention to consider the federal constitution, but had been successfully defeated through the agency of a Philadelphia mob, which captured some of the seceders and brought them by force to the Assembly, where they were counted to make a quorum, and the act passed. Speaker Reed's long contest with the Democrats of the House of Representatives, when they refused to answer the roll-call in order to block all legislation by a nominal lack of quorum, and his refusal to admit their contention, is the most recent attempt of the minority to prevent Congress from performing its duties, by laches of its own members.—EDITOR.

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the baneful practice of secessions; a practice which has shown itself even in States where a majority only is required; a practice subversive of all the principles of order and regular government; a practice which leads more directly to public convulsions and the ruin of popular governments than any other which has yet been displayed among us. PUBLIUS.

No. 59 [58]. (*New York Packet*, February 22, 1778.) Hamilton.

THE NATIONAL REGULATION OF ELECTIONS.

Every government must have the means of self-preservation—Different depositaries of this power considered—Exact character and extent of this power—If this power be not given, the federal government will be at the mercy of the state governments—The right of self-preservation in the state governments unimpaired—Objection that the power of the states in the election of senators is equally dangerous, considered—Reasons for this retention of power—Objection that the interests of each state will be a sufficient security against the abuse of the power to control the election of members by the state governments, considered.

To the People of the State of New York:

The natural order of the subject leads us to consider, in this place, that provision of the Constitution which authorizes the national legislature to regulate, in the last resort, the election of its own members.

It is in these words: "The *times*, *places*, and *manner* of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may, at any time, by law, make or alter *such regulations*, except as to the *places* of choosing senators."* This provision has not only been declaimed against by those who condemn the Constitution in the gross; but it has been censured by those who have objected with less latitude and greater moderation; and, in one instance, it has been thought exceptionable by a gentleman who has declared himself the advocate of every other part of the system.

* 1st clause, 4th section, of the 1st article.—PUBLIUS.

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I am greatly mistaken, notwithstanding, if there be any article in the whole plan more completely defensible than this. Its propriety rests upon the evidence of this plain proposition, that *every government ought to contain in itself the means of its own preservation.* Every just reasoner will, at first sight, approve an adherence to this rule, in the work of the convention; and will disapprove every deviation from it which may not appear to have been dictated by the necessity of incorporating into the work some particular ingredient with which a rigid conformity to the rule was incompatible. Even in this case, though he may acquiesce in the necessity, yet he will not cease to regard and to regret a departure from so fundamental a principle as a portion of imperfection in the system which may prove the seed of future weakness, and perhaps anarchy.

It will not be alleged that an election law could have been framed and inserted in the Constitution which would have been always applicable to every probable change in the situation of the country; and it will, therefore, not be denied that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former. The last mode has, with reason, been preferred by the convention. They have submitted the regulation of elections for the federal government, in the first instance, to the local administrations; which, in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety.

Nothing can be more evident than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave

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the existence of the Union entirely at their mercy. They could at any moment annihilate it by neglecting to provide for the choice of persons to administer its affairs. It is to little purpose to say that a neglect or omission of this kind would not be likely to take place. The constitutional possibility of the thing, without an equivalent for the risk, is an unanswerable objection. Nor has any satisfactory reason been yet assigned for incurring that risk. The extravagant surmises of a distempered jealousy can never be dignified with that character. If we are in a humor to presume abuses of power, it is as fair to presume them on the part of the State governments as on the part of the general government. And as it is more consonant to the rules of a just theory to trust the Union with the care of its own existence than to transfer that care to any other hands, if abuses of power are to be hazarded on the one side or on the other, it is more rational to hazard them where the power would naturally be placed than where it would unnaturally be placed.

Suppose an article had been introduced into the Constitution empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the State governments? The violation of principle, in this case, would have required no comment; and, to an unbiased observer, it will not be less apparent in the project of subjecting the existence of the national government, in a similar respect, to the pleasure of the State governments. An impartial view of the matter cannot fail to result in a conviction that each, as far as possible, ought to depend on itself for its own preservation.

As an objection to this position it may be remarked that the constitution of the national Senate would involve, in its full extent, the danger which it is suggested might flow from an exclusive power in the State legislatures to regulate the federal elections. It may be alleged that,

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by declining the appointment of senators, they might at any time give a fatal blow to the Union; and from this it may be inferred that, as its existence would be thus rendered dependent upon them in so essential a point, there can be no objection to intrusting them with it in the particular case under consideration. The interest of each State, it may be added, to maintain its representation in the national councils, would be a complete security against an abuse of the trust.

This argument, though specious, will not, upon examination, be found solid. It is certainly true that the State legislatures, by forbearing the appointment of senators, may destroy the national government. But it will not follow that, because they have the power to do this in one instance, they ought to have it in every other. There are cases in which the pernicious tendency of such a power may be far more decisive, without any motive equally cogent with that which must have regulated the conduct of the convention in respect to the formation of the Senate, to recommend their admission into the system. So far as that construction may expose the Union to the possibility of injury from the State legislatures, it is an evil, but it is an evil which could not have been avoided without excluding the States, in their political capacities, wholly from a place in the organization of the national government. If this had been done, it would doubtless have been interpreted into an entire dereliction of the federal principle; and would certainly have deprived the State governments of that absolute safeguard which they will enjoy under this provision. But however wise it may have been to have submitted in this instance to an inconvenience for the attainment of a necessary advantage or a greater good, no inference can be drawn from thence to favor an accumulation of the evil, where no necessity urges nor any greater good invites. .

It may be easily discerned also that the national government would run a much greater risk from a power in the State legislatures over the elections of its House of Representatives, than from their power of appointing

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the members of its Senate. The senators are to be chosen for the period of six years; there is to be a rotation, by which the seats of a third part of them are to be vacated and replenished every two years; and no State is to be entitled to more than two senators; a quorum of the body is to consist of sixteen members. The joint result of these circumstances would be that a temporary combination of a few States to intermit the appointment of senators, could neither annul the existence nor impair the activity of the body; and it is not from a general and permanent combination of the States that we can have anything to fear. The first might proceed from sinister designs in the leading members of a few of the State legislatures; the last would suppose a fixed and rooted disaffection in the great body of the people, which will either never exist at all, or will, in all probability, proceed from an experience of the inaptitude of the general government to the advancement of their happiness—in which event no good citizen could desire its continuance.

But with regard to the federal House of Representatives there is intended to be a general election of members once in two years. If the State legislatures were to be invested with an exclusive power of regulating these elections, every period of making them would be a delicate crisis in the national situation, which might issue in a dissolution of the Union, if the leaders of a few of the most important States should have entered into a previous conspiracy to prevent an election.

I shall not deny that there is a degree of weight in the observation that the interests of each State, to be represented in the federal councils, will be a security against the abuse of a power over its elections in the hands of the State legislatures. But the security will not be considered as complete, by those who attend to the force of an obvious distinction between the interest of the people in the public felicity and the interest of their local rulers in the power and consequence of their offices. The people of America may be

See No. 1.

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warmly attached to the government of the Union, at times when the particular rulers of particular States, stimulated by the natural rivalship of power, and by the hopes of personal aggrandizement, and supported by a strong faction in each of those States, may be in a very opposite temper. This diversity of sentiment between a majority of the people and the individuals who have the greatest credit in their councils is exemplified in some of the States at the present moment, on the present question. The scheme of separate confederacies, which will always multiply the chances of ambition, will be a never-failing bait to all such influential characters in the State administrations as are capable of preferring their own emolument and advancement to the public weal. With so effectual a weapon in their hands as the exclusive power of regulating elections for the national government, a combination of a few such men, in a few of the most considerable States, where the temptation will always be the strongest, might accomplish the destruction of the Union, by seizing the opportunity of some casual dissatisfaction among the people (and which perhaps they may themselves have excited), to discontinue the choice of members for the federal House of Representatives. It ought never to be forgotten that a firm union of this country under an efficient government will probably be an increasing object of jealousy to more than one nation of Europe; and that enterprises to subvert it will sometimes originate in the intrigues of foreign powers, and will seldom fail to be patronized and abetted by some of them. Its preservation, therefore, ought in no case that can be avoided to be committed to the guardianship of any but those whose situation will uniformly beget an immediate interest in the faithful and vigilant performance of the trust.

See No. 22.

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No. 60 [59]. (*Independent Journal*, February 23, 1788.) Hamilton.

NECESSITY OF SUCH NATIONAL CONTROL.

Consideration of the objection that by this power Congress may promote the election of a favorite class and exclude others—Reasons for dismissing this objection enumerated.

To the People of the State of New York:

We have seen that an uncontrollable power over the elections to the federal government could not, without hazard, be committed to the State legislatures. Let us now see what would be the danger on the other side; that is, from confiding the ultimate right of regulating its own elections to the Union itself. It is not pretended that this right would ever be used for the exclusion of any State from its share in the representation. The interest of all would, in this respect at least, be the security of all. But it is alleged that it might be employed in such a manner as to promote the election of some favorite class of men in exclusion of others, by confining the places of election to particular districts, and rendering it impracticable to the citizens at large to partake in the choice. Of all chimerical suppositions this seems to be the most chimerical. On the one hand, no rational calculation of probabilities would lead us to imagine that the disposition which a conduct so violent and extraordinary would imply could ever find its way into the national councils; and on the other, it may be concluded with certainty that, if so improper a spirit should ever gain admittance into them, it would display itself in a form altogether different and far more decisive.

The improbability of the attempt may be satisfactorily inferred from this single reflection that it could never be made without causing an immediate revolt of the great body of the people, headed and directed by the State governments. It is not difficult to conceive that this characteristic right of freedom may, in certain turbulent and factious seasons, be violated, in respect to a particular

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class of citizens, by a victorious and overbearing majority; but that so fundamental a privilege, in a country so situated and enlightened, should be invaded to the prejudice of the great mass of the people by the deliberate policy of the government, without occasioning a popular revolution, is altogether inconceivable and incredible.

In addition to this general reflection, there are considerations of a more precise nature which forbid all apprehension on the subject. The dissimilarity in the ingredients which will compose the national government, and still more in the manner in which they will be brought into action in its various branches, must form a powerful obstacle to a concert of views in any partial scheme of elections. There is sufficient diversity in the state of property, in the genius, manners, and habits of the people of the different parts of the Union, to occasion a material diversity of disposition in their representatives toward the different ranks and conditions in society. And though an intimate intercourse under the same government will promote a gradual assimilation in some of these respects, yet there are causes, as well physical as moral, which may, in a greater or less degree, permanently nourish different propensities and inclinations in this respect. But the circumstance which will be likely to have the greatest influence in the matter will be the dissimilar modes of constituting the several component parts of the government. The House of Representatives being to be elected immediately by the people, the Senate by the State legislatures, the President by electors chosen for that purpose by the people, there would be little probability of a common interest to cement these different branches in a predilection for any particular class of electors.

As to the Senate, it is impossible that any regulation of "time and manner," which is all that is proposed to be submitted to the national government in respect to that body, can affect the spirit which will direct the choice of its members. The collective sense of the State legislatures can never be influenced by extraneous circum-

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stances of that sort; a consideration which alone ought to satisfy us that the discrimination apprehended would never be attempted. For what inducement could the Senate have to concur in a preference in which itself would not be included? Or to what purpose would it be established in reference to one branch of the legislature, if it could not be extended to the other? The composition of the one would in this case counteract that of the other. And we can never suppose that it would embrace the appointments to the Senate, unless we can at the same time suppose the voluntary co-operation of the State legislatures. If we make the latter supposition, it then becomes immaterial where the power in question is placed—whether in their hands or in those of the Union.

But what is to be the object of this capricious partiality in the national councils? Is it to be exercised in a discrimination between the different departments of industry, or between the different kinds of property, or between the different degrees of property? Will it lean in favor of the landed interest, or the moneyed interest, or the mercantile interest, or the manufacturing interest? Or, to speak in the fashionable language of the adversaries to the Constitution, will it court the elevation of "the wealthy and the well-born," to the exclusion and debasement of all the rest of the society?

If this partiality is to be exerted in favor of those who are concerned in any particular description of industry or property, I presume it will readily be admitted that the competition for it will lie between landed men and merchants. And I scruple not to affirm that it is infinitely less likely that either of them should gain an ascendant in the national councils than that the one or the other of them should predominate in all the local councils. The inference will be that a conduct tending to give an undue preference to either is much less to be dreaded from the former than from the latter.

The several States are in various degrees addicted to agriculture and commerce. In most, if not all of them, agriculture is predominant. In a few of them, however,

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commerce nearly divides its empire, and in most of them has a considerable share of influence. In proportion as either prevails, it will be conveyed into the national representation; and for the very reason that this will be an emanation from a greater variety of interests, and in much more various proportions, than are to be found in any single State, it will be much less apt to espouse either of them with a decided partiality than the representation of any single State.

In a country consisting chiefly of the cultivators of land, where the rules of an equal representation obtain, the landed interest must, upon the whole, preponderate in the government. As long as this interest prevails in most of the State legislatures, so long it must maintain a correspondent superiority in the national Senate, which will generally be a faithful copy of the majorities of those assemblies. It cannot, therefore, be presumed that a sacrifice of the landed to the mercantile class will ever be a favorite object of this branch of the federal legislature. In applying thus particularly to the Senate a general observation suggested by the situation of the country, I am governed by the consideration that the credulous votaries of State power cannot, upon their own principles, suspect that the State legislatures would be warped from their duty by any external influence. But in reality the same situation must have the same effect, in the primitive composition at least of the federal House of Representatives; an improper bias toward the mercantile class is as little to be expected from this quarter as from the other.

In order, perhaps, to give countenance to the objection at any rate, it may be asked, is there not danger of an opposite bias in the national government, which may dispose it to endeavor to secure a monopoly of the federal administration to the landed class?[1] As there is little

[1] This battle between the two interests has been perpetual from the very foundation of the government. Under the Federalist régime, commerce and manufactures were thought by the landholding class to have been encouraged at their expense, and the triumph of Jefferson was their protest. Under the Democratic party the commercial classes in turn

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likelihood that the supposition of such a bias will have any terrors for those who would be immediately injured by it, a labored answer to this question will be dispensed with. It will be sufficient to remark, first, that for the reasons elsewhere assigned, it is less likely that any decided partiality should prevail in the councils of the Union than in those of any of its members. Secondly, that there would be no temptation to violate the Constitution in favor of the landed class, because that class would, in the natural course of things, enjoy as great a preponderancy as itself could desire. And thirdly, that men accustomed to investigate the sources of public prosperity upon a large scale, must be too well convinced of the utility of commerce to be inclined to inflict upon it so deep a wound as would result from the entire exclusion of those who would best understand its interest from a share in the management of them. The importance of commerce, in the view of revenue alone, must effectually guard it against the enmity of a body which would be continually importuned in its favor by the urgent calls of public necessity.

I the rather consult brevity in discussing the probability of a preference founded upon a discrimination between the different kinds of industry and property, because, as far as I understand the meaning of the objectors, they contemplate a discrimination of another kind. They appear to have in view, as the objects of the preference with which they endeavor to alarm us, those whom they designate by the description of "the wealthy and

asserted that they were sacrificed to the landed interest by the embargo and war of 1812. Under the tariff of 1824 once more the landholders felt that they were injured, an injury which finally found extreme expression in attempted nullification. The slavery contest and Rebellion submerged the differences, but with the passing of the issues which they involved, the battle has been renewed in the tariff struggle of 1888-1897, and, to a certain extent, in the fiat-money, silver, and income-tax issues. A far severer contest between the two interests has taken place in Europe, with no material loss to the landholders in France and Germany; but in Great Britain the growth of the commercial classes has been such as to secure to them an overbearing influence in legislation, which has resulted in the entire sacrifice of the landed classes. —EDITOR.

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the well-born." These, it seems, are to be exalted to an odious pre-eminence over the rest of their fellow-citizens. At one time, however, their elevation is to be a necessary consequence of the smallness of the representative body; at another time it is to be effected by depriving the people at large of the opportunity of exercising their right of suffrage in the choice of that body.

But upon what principle is the discrimination of the places of election to be made, in order to answer the purpose of the meditated preference? Are "the wealthy and the well-born," as they are called, confined to particular spots in the several States? Have they, by some miraculous instinct or foresight, set apart in each of them a common place of residence? Are they only to be met with in the towns or cities? Or are they, on the contrary, scattered over the face of the country as avarice or chance may have happened to cast their own lot or that of their predecessors? If the latter is the case (as every intelligent man knows it to be*), is it not evident that the policy of confining the places of election to particular districts would be as subversive of its own aim as it would be exceptionable on every other account? The truth is that there is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the national government. Its authority would be expressly restricted to the regulation of the *times*, the *places*, the *manner* of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature.

Let it, however, be admitted, for argument sake, that the expedient suggested might be successful; and let it at the same time be equally taken for granted that all the scruples which a sense of duty or an apprehension of

* Particularly in the Southern States and in this State.—PUBLIUS.

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the danger of the experiment might inspire, were overcome in the breasts of the national rulers; still I imagine it will hardly be pretended that they could ever hope to carry such an enterprise into execution without the aid of a military force sufficient to subdue the resistance of the great body of the people. The improbability of the existence of a force equal to that object has been discussed and demonstrated in different parts of these papers; but that the futility of the objection under consideration may appear in the strongest light, it shall be conceded for a moment that such a force might exist, and the national government shall be supposed to be in the actual possession of it. What will be the conclusion? With a disposition to invade the essential rights of the community, and with the means of gratifying that disposition, is it presumable that the persons who were actuated by it would amuse themselves in the ridiculous task of fabricating election laws for securing a preference to a favorite class of men? Would they not be likely to prefer a conduct better adapted to their own immediate aggrandizement? Would they not rather boldly resolve to perpetuate themselves in office by one decisive act of usurpation than to trust to precarious expedients which, in spite of all the precautions that might accompany them, might terminate in the dismission, disgrace, and ruin of their authors? Would they not fear that citizens, not less tenacious than conscious of their rights, would flock from the remote extremes of their respective States to the places of election, to overthrow their tyrants, and to substitute men who would be disposed to avenge the violated majesty of the people? PUBLIUS.

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No. 61 [60]. (*New York Packet*, February 26, 1788.) Hamilton.

ADVANTAGE OF POWER IN SECURING UNIFORMITY IN ELECTIONS.

Objection that there should be a provision that all elections should be held within the counties where the electors live—Such a provision harmless and offers no security—This provision compared with those of state constitutions—The probability that the power of Congress to fix a uniform day for elections will be very important—The want of any provisions in the constitution fixing such a day considered—Concluding remarks on the general subject.

To the People of the State of New York:

The more candid opposers of the provision respecting elections contained in the plan of the convention, when pressed in argument, will sometimes concede the propriety of that provision; with this qualification, however, that it ought to have been accompanied with a declaration that all elections should be had in the counties where the electors resided. This, say they, was a necessary precaution against an abuse of the power. A declaration of this nature would certainly have been harmless; so far as it would have had the effect of quieting apprehensions, it might not have been undesirable. But it would, in fact, have afforded little or no additional security against the danger apprehended; and the want of it will never be considered by an impartial and judicious examiner, as a serious, still less as an insuperable objection to the plan. The different views taken of the subject in the two preceding papers must be sufficient to satisfy all dispassionate and discerning men that, if the public liberty should ever be the victim of the ambition of the national rulers, the power under examination, at least, will be guiltless of the sacrifice.

If those who are inclined to consult their jealousy only would exercise it in a careful inspection of the several State constitutions, they would find little less room for disquietude and alarm from the latitude which most of them allow in respect to elections than from the latitude which is proposed to be allowed to the national government in the same respect. A review of their situation, in

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this particular, would tend greatly to remove any ill impressions which may remain in regard to this matter. But as that view would lead into long and tedious details, I shall content myself with the single example of the State in which I write. The constitution of New York makes no other provision for *locality* of elections than that the members of the Assembly shall be elected in the *counties;* those of the Senate, in the great districts into which the State is or may be divided: these at present are four in number, and comprehend each from two to six counties. It may readily be perceived that it would not be more difficult to the legislature of New York to defeat the suffrages of the citizens of New York, by confining elections to particular places, than for the legislature of the United States to defeat the suffrages of the citizens of the Union by the like expedient. Suppose, for instance, the city of Albany was to be appointed the sole place of election for the country and district of which it is a part, would not the inhabitants of that city speedily become the only electors of the members both of the Senate and Assembly for that county and district? Can we imagine that the electors who reside in the remote subdivisions of the counties of Albany, Saratoga, Cambridge, etc., or in any part of the county of Montgomery, would take the trouble to come to the city of Albany, to give their votes for members of the Assembly or Senate, sooner than they would repair to the city of New York, to participate in the choice of the members of the federal House of Representatives? The alarming indifference discoverable in the exercise of so invaluable a privilege under the existing laws, which afford every facility to it, furnishes a ready answer to this question. And, abstracted from any experience on the subject, we can be at no loss to determine that, when the place of election is at an *inconvenient distance* from the elector, the effect upon his conduct will be the same whether that distance be twenty miles or twenty thousand miles. Hence it must appear that objections to the particular modification of the federal power of regulating elections will, in substance, apply with equal force to the modification of the like power in the constitution of this State; and for this reason it will be impossible to acquit the one and to condemn the other. A similar comparison would lead to the same conclusion in respect to the constitutions of most of the other States.

If it should be said that defects in the State constitutions furnish no apology for those which are to be found in the plan proposed, I answer that, as the former have never been thought chargeable with inattention to the security of liberty, where the imputations

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thrown on the latter can be shown to be applicable to them also, the presumption is that they are rather the caviling refinements of a predetermined opposition than the well-founded inferences of a candid research after truth. To those who are disposed to consider as innocent omissions in the State constitutions what they regard as unpardonable blemishes in the plan of the convention nothing can be said; or, at most, they can only be asked to assign some substantial reason why the representatives of the people in a single State should be more impregnable to the lust of power, or other sinister motives, than the representatives of the people of the United States. If they cannot do this, they ought at least to prove to us that it is easier to subvert the liberties of three millions of people, with the advantage of local governments to head their opposition, than of two hundred thousand people who are destitute of that advantage. And in relation to the point immediately under consideration, they ought to convince us that it is less probable that a predominant faction in a single State should, in order to maintain its superiority, incline to a preference of a particular class of electors than that a similar spirit should take possession of the representatives of thirteen States, spread over a vast region, and in several respects distinguishable from each other by a diversity of local circumstances, prejudices, and interests.

Hitherto my observations have only aimed at a vindication of the provision in question on the ground of theoretic propriety, on that of the danger of placing the power elsewhere, and on that of the safety of placing it in the manner proposed. But there remains to be mentioned a positive advantage which will result from this disposition, and which could not as well have been obtained from any other: I allude to the circumstance of uniformity in the time of elections for the federal House of Representatives. It is more than possible that this uniformity may be found by experience to be of great importance to the public welfare, both as a security against the perpetuation of the same spirit in the body, and as a cure for the diseases of faction. If each State may choose its own time of election, it is possible there may be at least as many different periods as there are months in the year. The times of election in the several States, as they are now established for local purposes,

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vary between extremes as wide as March and November. The consequence of this diversity would be that there could never happen a total dissolution or renovation of the body at one time. If an improper spirit of any kind should happen to prevail in it, that spirit would be apt to infuse itself into the new members, as they come forward in succession. The mass would be likely to remain nearly the same, assimilating constantly to itself its gradual accretions. There is a contagion in example which few men have sufficient force of mind to resist. I am inclined to think that treble the duration in office, with the condition of a total dissolution of the body at the same time, might be less formidable to liberty than one-third of that duration subject to gradual and successive alterations.

Uniformity in the time of elections seems not less requisite for executing the idea of a regular rotation in the Senate, and for conveniently assembling the legislature at a stated period in each year.

It may be asked, Why, then, could not a time have been fixed in the Constitution? As the most zealous adversaries of the plan of the convention in this State are, in general, not less zealous admirers of the constitution of the State, the question may be retorted, and it may be asked, Why was not a time for the like purpose fixed in the constitution of this State? No better answer can be given than that it was a matter which might safely be intrusted to legislative discretion; and that if a time had been appointed, it might, upon experiment, have been found less convenient than some other time. The same answer may be given to the question put on the other side. And it may be added that the supposed danger of a gradual change being merely speculative, it would have been hardly advisable upon that speculation to establish, as a fundamental point, what would deprive several States of the convenience of having the elections for their own governments and for the national government at the same epochs. PUBLIUS.

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No. 62 [61]. (*Independent Journal*, February 27, 1788) Hamilton (?)

THE CONSTITUTION OF THE SENATE.

Qualifications of senators—Appointment of senators by state legislatures—Equality of representation in senate—Mixed character of federal government requires a mixed representation—Equal representation in senate a recognition of sovereignty in the states—The number of senators and the term for which they are elected—Need of such an upper house as a security against improper legislation—Against the infirmity of faction—Against ignorant legislation—Against mutability in its councils from frequent changes of members—Dangers of such mutability enumerated.

To the People of the State of New York:

Having examined the constitution of the House of Representatives and answered such of the objections against it as seemed to merit notice, I enter next on the examination of the Senate.

The heads into which this member of the government may be considered are: I. The qualifications of senators; II. The appointment of them by the State legislatures; III. The equality of representation in the Senate; IV. The number of senators, and the term for which they are to be elected; V. The powers vested in the Senate.

I. The qualifications proposed for senators, as distinguished from those of representatives, consist in a more advanced age and a longer period of citizenship. A senator must be thirty years of age at least, as a representative must be twenty-five. And the former must have been a citizen nine years; as seven years are required for the latter. The propriety of these distinctions is explained by the nature of the senatorial trust, which, requiring greater extent of information and stability of character, requires at the same time that the senator should have reached a period of life most likely to supply these advantages; and which, participating immediately in transactions with foreign nations, ought to be exercised by none who are not thoroughly weaned from the prepossessions and habits incident to foreign

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birth and education. The term of nine years appears to be a prudent mediocrity between a total exclusion of adopted citizens, whose merits and talents may claim a share in the public confidence, and an indiscriminate and hasty admission of them, which might create a channel for foreign influence on the national councils.

II. It is equally unnecessary to dilate on the appointment of senators by the State legislatures. Among the various modes which might have been devised for constituting this branch of the government, that which has been proposed by the convention is probably the most congenial with the public opinion.[1] It is recommended by the double advantage of favoring a select appointment, and of giving to the State governments such an agency in the formation of the federal government as must secure the authority of the former and may form a convenient link between the two systems.

III. The equality of representation in the Senate is another point which, being evidently the result of compromise between the opposite pretensions of the large and the smaller States, does not call for much discussion. If indeed it be right that, among a people thoroughly incorporated into one nation, every district ought to

[1] After the test of one hundred years, it is possible to acknowledge that the appointment of senators by the state legislatures has by no means secured to the nation so satisfactory a result as would have been obtained by popular election. Originally framed for this very purpose of securing a "select appointment" it has, in its results, ended in being the means by which vested interests most easily obtain an influence in our government. At this moment certain senators are understood to represent sugar, or silver, or steel, or railroads, and this is due, as baldly expressed in a remark credited to Jay Gould, to the fact that it is cheaper to buy a legislature than it is to buy a people, and therefore this branch of our government is at once the cheapest and easiest means by which special interests may secure representation. But another, and even greater evil, not conceived by the framers, has arisen from the part which the election of a senator plays in state politics, and the influence which it has on legislative proceedings. Very often the state legislature is kept longer in session to elect a senator than to pass current legislation, and not infrequently, where state issues have had their proper influence, the politics of the senator are the exact opposite of the views of the state as shown by the vote for President or for representatives. The defects of the system are well indicated in Haynes's "Popular Election of United States Senators," 1893.—EDITOR.

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have a *proportional* share in the government, and that among independent and sovereign States, bound together by a simple league, the parties, however unequal in size, ought to have an *equal* share in the common councils, it does not appear to be without some reason that in a compound republic, partaking both of the national and federal character, the government ought to be founded on a mixture of the principles of proportional and equal representation. But it is superfluous to try, by the standard of theory, a part of the Constitution which is allowed on all hands to be the result, not of theory, but "of a spirit of amity, and that mutual deference and concession which the peculiarity of our political situation rendered indispensable." A common government, with powers equal to its objects, is called for by the voice, and still more loudly by the political situation, of America. A government founded on principles more consonant to the wishes of the larger States is not likely to be obtained from the smaller States. The only option, then, for the former, lies between the proposed government and a government still more objectionable. Under this alternative, the advice of prudence must be to embrace the lesser evil; and, instead of indulging a fruitless anticipation of the possible mischiefs which may ensue, to contemplate rather the advantageous consequences which may qualify the sacrifice.

In this spirit it may be remarked that the equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty.[1] So far the

See No. 37.

[1] The results, in spite of the inequality of representation, have in the main been admirable. So far from developing coalitions of small states designed to defeat the will of the majority, the Senate has rarely shown other lines of division than those which have also divided the House of Representatives, and though it has occasionally opposed the views of that more popular body, the opposition has never been so persistent as not to produce ultimate agreement. Created to prevent undue variability and haste in the lower house, and to check any attempted expansion of the executive power, it has served the purposes for which it was designed with admirable consistence. As a legislative or initiative

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equality ought to be no less acceptable to the large than to the small States; since they are not less solicitous to guard, by every possible expedient, against an improper consolidation of the States into one single republic.

Another advantage accruing from this ingredient in the constitution of the Senate is the additional impediment it must prove against improper acts of legislation. No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then of a majority of the States. It must be acknowledged that this complicated check on legislation may in some instances be injurious as well as beneficial; and that the peculiar defense which it involves in favor of the smaller States would be more rational if any interests common to them, and distinct from those of the other States would otherwise be exposed to peculiar danger. But as the larger States will always be able, by their power over the supplies, to defeat unreasonable exertions of this prerogative of the lesser States, and as the facility and excess of lawmaking seem to be the diseases to which our governments are most liable,[1] it is

force it has shown little ability, but as a negative power its influence has been only second to that of the supreme court. At present it is the subject of attack because of its plutocratic tendency, but this was the very hope of the men who framed the provisions that created it, and introduces into the government that representation of property which the framers wished, but could not accomplish.—EDITOR.

[1] De Tocqueville, in his "Democracy in America," cited as one of its defects an instability in legislation, but so good an observer as Mr. Bryce presumes that his comparison was with France, "where the Code has arrested legislation"; and he adds that in "the last thirty years [from 1867] there have been more important changes in ordinary law annually made by the English Parliament than by most American legislatures." This can be extended to include Congress as well, and broadly speaking is true of the legislation of the last hundred years, for the American of to-day is governed by laws which have been broadened rather than changed from those which governed his grandfather, while in England the general body of laws has undergone many and radical changes. This is partly to be accounted for by the fact that the growth of democracy, almost equal in both countries, found in the United States legal conditions already adapted to it, while in Great Britain a new system had to be developed. Still further, the check on the legislative power in the United States, first by the veto, and last by the supreme court, doubly tends to discourage legislation; while in Great Britain, where the power of veto has been lost, where Parliament has practically come to be

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not impossible that this part of the Constitution may be more convenient in practice than it appears to many in contemplation.

IV. The number of senators, and the duration of their appointment, come next to be considered. In order to form an accurate judgment on both these points, it will be proper to inquire into the purposes which are to be answered by a senate; and in order to ascertain these, it will be necessary to review the inconveniences which a republic must suffer from the want of such an institution.

First. It is a misfortune incident to republican government, though in a less degree than to other governments, that those who administer it may forget their obligations to their constituents and prove unfaithful to their important trust. In this point of view, a senate, as a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must be in all cases a salutary check on the government. It doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient. This is a precaution founded on such clear principles, and now so well understood in the United States, that it would be more than superfluous to enlarge on it. I will barely remark that, as the improbability of sinister combinations will be in proportion to the dissimilarity in the genius of the two bodies, it must be politic to distinguish them from each other by every circumstance which will consist with a due harmony in all proper measures and with the genuine principles of republican government.

Secondly. The necessity of a senate is not less indicated by the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions. Examples on this subject

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omnipotent, and where even the second legislative body is steadily losing its power of restraint, an opposite tendency is to be observed.—EDITOR.

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might be cited without number; and from proceedings within the United States, as well as from the history of other nations. But a position that will not be contradicted need not be proved. All that need be remarked is that a body which is to correct this infirmity ought itself to be free from it, and consequently ought to be less numerous. It ought, moreover, to possess great firmness, and consequently ought to hold its authority by a tenure of considerable duration.

Thirdly. Another defect to be supplied by a senate lies in a want of due acquaintance with the objects and principles of legislation. It is not possible that an assembly of men called for the most part from pursuits of a private nature, continued in appointment for a short time, and led by no permanent motive to devote the intervals of public occupation to a study of the laws, the affairs, and the comprehensive interests of their country, should, if left wholly to themselves, escape a variety of important errors in the exercise of their legislative trust. It may be affirmed, on the best grounds, that no small share of the present embarrassments of America is to be charged on the blunders of our governments; and that these have proceeded from the heads rather than the hearts of most of the authors of them. What indeed are all the repealing, explaining, and amending laws, which fill and disgrace our voluminous codes, but so many monuments of deficient wisdom; so many impeachments exhibited by each succeeding against each preceding session; so many admonitions to the people of the value of those aids which may be expected from a well-constituted senate?

See No. 53.

A good government implies two things: first, fidelity to the object of government, which is the happiness of the people; secondly, a knowledge of the means by which that object can be best attained. Some governments are deficient in both these qualities; most governments are deficient in the first. I scruple not to assert that in American governments too little attention has been paid to the last. The federal Constitution avoids this error;

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and what merits particular notice, it provides for the last in a mode which increases the security for the first.

Fourthly. The mutability in the public councils arising from a rapid succession of new members, however qualified they may be, points out, in the strongest manner, the necessity of some stable institution in the government. Every new election in the States is found to change one-half of the representatives. From this change of men must proceed a change of opinions; and from a change of opinions, a change of measures. But a continual change even of good measures is inconsistent with every rule of prudence and every prospect of success. The remark is verified in private life, and becomes more just, as well as more important, in national transactions.

To trace the mischievous effects of a mutable government would fill a volume. I will hint a few only, each of which will be perceived to be a source of innumerable others.

In the first place, it forfeits the respect and confidence of other nations and all the advantages connected with national character. An individual who is observed to be inconstant to his plans, or perhaps to carry on his affairs without any plan at all, is marked at once, by all prudent people, as a speedy victim to his own unsteadiness and folly. His more friendly neighbors may pity him, but all will decline to connect their fortunes with his; and not a few will seize the opportunity of making their fortunes out of his. One nation is to another what one individual is to another; with this melancholy distinction perhaps, that the former, with fewer of the benevolent emotions than the latter, are under fewer restraints also from taking undue advantage from the indiscretions of each other. Every nation, consequently, whose affairs betray a want of wisdom and stability, may calculate on every loss which can be sustained from the more systematic policy of their wiser neighbors. But the best instruction on this subject is unhappily conveyed to America by the example of her own situation. She finds that she is held in no respect by her friends; that she is the derision of

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her enemies; and that she is a prey to every nation which has an interest in speculating on her fluctuating councils and embarrassed affairs.

The internal effects of a mutable policy are still more calamitous. It poisons the blessing of liberty itself. It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man who knows what the law is to-day can guess what it will be to-morrow. Law is defined to be a rule of action; but how can that be a rule which is little known and less fixed?

Another effect of public instability is the unreasonable advantage it gives to the sagacious, the enterprising, and the moneyed few over the industrious and uninformed mass of the people. Every new regulation concerning commerce or revenue, or in any manner affecting the value of the different species of property, presents a new harvest to those who watch the change and can trace its consequences; a harvest reared not by themselves, but by the toils and cares of the great body of their fellow-citizens. This is a state of things in which it may be said with some truth that laws are made for the *few*, not for the *many*.[1]

[1] Very recent events have proved the truth of this principle. Unscrupulous members of Congress, and the shrewder speculators, have taken advantage of the public measures to an extent which has caused great scandals. The silver pool bought large blocks of silver as a preliminary to the passing of the silver purchase law. The buying of sugar trust stock just prior to the settling of the differential duty of the tariff of 1894 put large sums of money into the pockets of the very men who arranged the rate; and this tariff, by the increased tax on spirits, enabled the whisky trust to make a large amount. So, just previous to the passage of the present (1897) tariff, in view of the new tariff schedules, large amounts of merchandise were hurried into the country, to be sold later on the basis of the new duties. Thus each special interest is enabled through legislative changes to make undue profits, while the unpolitical or uncommercial man, be he rich or poor, so far from receiving a share, is invariably the one who pays the profit; thus effectually realizing Hamilton's arraignment of unstable legislation because thereby the "laws are made for the *few*, not for the *many*."—EDITOR.

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In another point of view, great injury results from an unstable government. The want of confidence in the public councils damps every useful undertaking the success and profit of which may depend on a continuance of existing arrangements. What prudent merchant will hazard his fortunes in any new branch of commerce when he knows not but that his plans may be rendered unlawful before they can be executed? What farmer or manufacturer will lay himself out for the encouragement given to any particular cultivation or establishment, when he can have no assurance that his preparatory labors and advances will not render him a victim to an inconstant government? In a word, no great improvement or laudable enterprise can go forward which requires the auspices of a steady system of national policy.

But the most deplorable effect of all is that diminution of attachment and reverence which steals into the hearts of the people, towards a political system which betrays so many marks of infirmity, and disappoints so many of their flattering hopes. No government, any more than an individual, will long be respected without being truly respectable; nor be truly respectable without possessing a certain portion of order and stability. PUBLIUS.

No. 63 [62]. (*Independent Journal, March 2, 1788.*) Hamilton (?)

TERM OF APPOINTMENT OF THE SENATE.

Prevents a want of a due sense of national character, of a due responsibility, and of a defense against temporary errors and delusions—History shows no long-lived republic without a Senate—Difference between the ancient republics and the United States—Athens, Carthage, Sparta, Rome, Crete—Objection that the Senate will acquire a dangerous preeminence considered—Such a result impossible—Senate of Maryland—British Parliament—Sparta, Rome, Carthage—The controlling influence of the House of Representatives.

To the People of the State of New York:

A *fifth* desideratum, illustrating the utility of a Senate, is the want of a due sense of national character. With-

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out a select and stable member of the government, the esteem of foreign powers will not only be forfeited by an unenlightened and variable policy, proceeding from the causes already mentioned, but the national councils will not possess that sensibility to the opinion of the world which is perhaps not less necessary in order to merit, than it is to obtain, its respect and confidence.

An attention to the judgment of other nations is important to every government for two reasons: the one is that, independently of the merits of any particular plan or measure, it is desirable, on various accounts, that it should appear to other nations as the offspring of a wise and honorable policy; the second is that in doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed. What has not America lost by her want of character with foreign nations; and how many errors and follies would she not have avoided, if the justice and propriety of her measures had, in every instance, been previously tried by the light in which they would probably appear to the unbiased part of mankind?

Yet however requisite a sense of national character may be, it is evident that it can never be sufficiently possessed by a numerous and changeable body. It can only be found in a number so small that a sensible degree of the praise and blame of public measures may be the portion of each individual; or in an assembly so durably invested with public trust that the pride and consequence of its members may be sensibly incorporated with the reputation and prosperity of the community. The half-yearly representatives of Rhode Island would probably have been little affected in their deliberations on the iniquitous measures of that State by arguments drawn from the light in which such measures would be viewed by foreign nations, or even by the sister States; whilst it can scarcely be doubted that if the concurrence of a select and stable body had been necessary, a regard to national

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character alone would have prevented the calamities under which that misguided people is now laboring.

I add, as a *sixth* defect, the want, in some important cases, of a due responsibility in the government to the people, arising from that frequency of elections which in other cases produces this responsibility.[1] This remark will, perhaps, appear not only new, but paradoxical. It must nevertheless be acknowledged, when explained, to be as undeniable as it is important.

Responsibility, in order to be reasonable, must be limited to objects within the power of the responsible party, and, in order to be effectual, must relate to operations of that power, of which a ready and proper judgment can be formed by the constituents. The objects of government may be divided into two general classes: the one depending on measures which have singly an immediate and sensible operation; the other depending on a succession of well-chosen and well-connected measures, which have a gradual and perhaps unobserved operation. The importance of the latter description to the collective and permanent welfare of every country needs no explanation. And yet it is evident that an assembly elected for so short a term as to be unable to provide more than one or two links in a chain of measures, on which the general welfare may essentially depend, ought not to be answerable for the final result, any more than a steward or tenant, engaged for one year, could be justly made to answer for places or improvements which could not be

[1] One element of this irresponsibility is due to a recurring condition which our election laws have produced. Every two years a new House of Representatives is chosen in November, but after the results of the election are known, the Congress elected two years before holds one more session before it is replaced by the new body. In consequence of this, some of the representives and senators know that they are to go out of office, and, re-election being no longer possible, are heedless of public opinion. With hardly an exception, the "hold-over sessions" of Congress are marked by an unusual outburst of extravagance, jobbery, and special legislation. The defect could easily be remedied by such change either of the date of election, or of the meeting of Congress, that no superseded Congress could legislate. In both Great Britain and France a new election of the representative body at once ends the term of that hitherto holding office.—EDITOR.

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accomplished in less than half a dozen years. Nor is it possible for the people to estimate the *share* of influence which their annual assemblies may respectively have on events resulting from the mixed transactions of several years. It is sufficiently difficult to preserve a personal responsibility in the members of a *numerous* body for such acts of the body as have an immediate, detached, and palpable operation on its constituents.

The proper remedy for this defect must be an additional body in the legislative department, which, having sufficient permanency to provide for such objects as require a continued attention, and a train of measures, may be justly and effectually answerable for the attainment of those objects.

Thus far I have considered the circumstances which point out the necessity of a well-constructed Senate only as they relate to the representatives of the people. To a people as little blinded by prejudice or corrupted by flattery as those whom I address, I shall not scruple to add that such an institution may be sometimes necessary as a defense to the people against their own temporary errors and delusions. As the cool and deliberate sense of the community ought, in all governments, and actually will, in all free governments, ultimately prevail over the views of its rulers; so there are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind? What bitter anguish would not the people of Athens have often escaped if their government had contained so provident a safeguard against the tyranny of their own passions? Popular liberty might then have

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escaped the indelible reproach of decreeing to the same citizens the hemlock on one day and statues on the next.

It may be suggested that a people spread over an extensive region cannot, like the crowded inhabitants of a small district, be subject to the infection of violent passions or to the danger of combining in pursuit of unjust measures. I am far from denying that this is a distinction of peculiar importance. I have, on the contrary, endeavored in a former paper to show that it is one of the principal recommendations of a confederated republic. At the same time, this advantage ought not to be considered as superseding the use of auxiliary precautions. It may even be remarked that the same extended situation which will exempt the people of America from some of the dangers incident to lesser republics will expose them to the inconveniency of remaining, for a longer time, under the influence of those misrepresentations which the combined industry of interested men may succeed in distributing among them.

See Nos. 9 and 47.

It adds no small weight to all these considerations to recollect that history informs us of no long-lived republic which had not a senate. Sparta, Rome, and Carthage are, in fact, the only states to whom that character can be applied. In each of the two first there was a senate for life. The constitution of the senate in the last is less known. Circumstantial evidence makes it probable that it was not different in this particular from the two others. It is at least certain that it had some quality or other which rendered it an anchor against popular fluctuations; and that a smaller council, drawn out of the senate, was appointed not only for life, but filled up vacancies itself. These examples, though as unfit for the imitation as they are repugnant to the genius of America, are, notwithstanding, when compared with the fugitive and turbulent existence of other ancient republics, very instructive proofs of the necessity of some institution that will blend stability with liberty. I am not unaware of the circumstances which distinguish the American from other popular governments, as well ancient as modern; and which render extreme circumspection necessary in reasoning from the one case to the other. But after allowing due weight to this consideration, it may still be maintained that there are many points of similitude which render these examples not un-

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worthy of our attention. Many of the defects, as we have seen, which can only be supplied by a senatorial institution, are common to a numerous assembly frequently elected by the people, and to the people themselves. There are others peculiar to the former, which require the control of such an institution. The people can never willfully betray their own interests, but they may possibly be betrayed by the representatives of the people; and the danger will be evidently greater where the whole legislative trust is lodged in the hands of one body of men than where the concurrence of separate and dissimilar bodies is required in every public act.

The difference most relied on, between the American and other republics, consists in the principle of representation; which is the pivot on which the former move, and which is supposed to have been unknown to the latter or at least to the ancient part of them. The use which has been made of this difference in reasonings contained in former papers will have shown that I am disposed neither to deny its existence nor to undervalue its importance. I feel the less restraint, therefore, in observing that the position concerning the ignorance of the ancient governments on the subject of representation is by no means precisely true in the latitude commonly given to it. Without entering into a disquisition which here would be misplaced, I will refer to a few known facts in support of what I advance.

See No. 14.

In the most pure democracies of Greece, many of the executive functions were performed, not by the people themselves, but by officers elected by the people, and *representing* the people in their *executive* capacity.

Prior to the reform of Solon Athens was governed by nine Archons, annually *elected by the people at large*. The degree of power delegated to them seems to be left in great obscurity. Subsequent to that period, we find an assembly, first of four, and afterward of six hundred members, annually *elected by the people;* and *partially* representing them in their *legislative* capacity, since they were not only associated with the people in the function of making laws, but had the exclusive right of originating legislative propositions to the people. The senate of Carthage, also, whatever might be its power, or the duration of its appointment, appears to have been *elective* by the suffrages of the people. Similar instances might be traced in most, if not all the popular governments of antiquity.

Lastly, in Sparta we meet with the Ephori, and in Rome with the Tribunes; two bodies, small indeed in numbers, but annually *elected by the whole body of the people*, and considered as the

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representatives of the people, almost in their *plenipotentiary* capacity. The Cosmi of Crete were also annually *elected by the people*, and have been considered by some authors as an institution analogous to those of Sparta and Rome, with this difference only, that in the election of that representative body the right of suffrage was communicated to a part only of the people.

From these facts, to which many others might be added, it is clear that the principle of representation was neither unknown to the ancients nor wholly overlooked in their political constitutions. The true distinction between these and the American governments lies *in the total exclusion of the people, in their collective capacity*, from any share in the *latter*, and not in the *total exclusion of the representatives of the people* from the administration of the *former*. The distinction, however, thus qualified, must be admitted to leave a most advantageous superiority in favor of the United States. But to insure to this advantage its full effect, we must be careful not to separate it from the other advantage, of an extensive territory. For it cannot be believed that any form of representative government could have succeeded within the narrow limits occupied by the democracies of Greece.[1]

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[1] "But federalism, with its pacific implications, was not an invention of the Teutonic mind. The idea was familiar to the city communities of ancient Greece, which, along with their intense love of self-government, felt the need of combined action for warding off external attack. In their Achaian and Aitolian leagues the Greeks made brilliant attempts toward founding a nation upon some higher principle than that of mere conquest, and the history of these attempts is exceedingly interesting and instructive. They failed for lack of the principle of representation, which was practically unknown to the world until introduced by the Teutonic colonizers of the Roman empire. Until the idea of power delegated by the people had become familiar to men's minds in its practical bearings, it was impossible to create a great nation without crushing out the political life in some of its parts. Some center of power was sure to absorb all the political life, and grow at the expense of the outlying parts, until the result was a centralized despotism. Hence it came to be one of the commonplace assumptions of political writers that republics must be small, that free government is practicable only in a confined area, and that the only strong and durable government, capable of maintaining order throughout a vast territory, is some form of absolute monarchy. It was quite natural that people should formerly have held this opinion, and it is indeed not yet quite obsolete, but its fallaciousness will become more and more apparent as American history is better understood. Our experience has now so far widened that we can see that despotism is not the strongest but well-nigh the weakest form of government; that centralized administrations, like that of the Roman empire, have fallen to pieces, not because of too much, but because of too little freedom; and that the only perdurable government must be that which succeeds in achieving national unity on a grand scale, without

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In answer to all these arguments, suggested by reason, illustrated by examples, and enforced by our own experience, the jealous adversary of the Constitution will probably content himself with repeating that a senate appointed not immediately by the people, and for the term of six years, must gradually acquire a dangerous pre-eminence in the government, and finally transform it into a tyrannical aristocracy.

To this general answer the general reply ought to be sufficient that liberty may be endangered by the abuses of liberty as well as by the abuses of power; that there are numerous instances of the former as well as of the latter; and that the former, rather than the latter, are apparently most to be apprehended by the United States. But a more particular reply may be given.

Before such a revolution can be effected the Senate, it is to be observed, must in the first place corrupt itself; must next corrupt the State legislatures; must then corrupt the House of Representatives; and must finally corrupt the people at large. It is evident that the Senate must be first corrupted before it can attempt an establishment of tyranny. Without corrupting the State legislatures, it cannot prosecute the attempt, because the periodical change of members would otherwise regenerate the whole body. Without exerting the means of corrup-

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weakening the sense of personal and local independence. For in the body politic this spirit of freedom is as the red corpuscles in the blood; it carries the life with it. It makes the difference between a society of self-respecting men and women and a society of puppets. Your nation may have art, poetry, and science, all the refinements of civilized life, all the comforts and safeguards that human ingenuity can devise; but if it lose this spirit of personal and local independence, it is doomed and deserves its doom. As President Cleveland has well said, it is not the business of a government to support its people, but of the people to support their government; and once to lose sight of this vital truth is as dangerous as to trifle with some stealthy narcotic poison. Of the two opposite perils which have perpetually threatened the welfare of political society—anarchy on the one hand, loss of self-government on the other—Jefferson was right in maintaining that the latter is really the more to be dreaded because its beginnings are so terribly insidious. Many will understand what is meant by a threat of secession, where few take heed of the baneful principle involved in a Texas Seed-bill."—Fiske's "Beginnings of New England."—EDITOR.

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tion with equal success on the House of Representatives, the opposition of that coequal branch of the government would inevitably defeat the attempt; and without corrupting the people themselves, a succession of new representatives would speedily restore all things to their pristine order. Is there any man who can seriously persuade himself that the proposed Senate can, by any possible means within the compass of human address, arrive at the object of a lawless ambition through all these obstructions?

If reason condemns the suspicion, the same sentence is pronounced by experience. The constitution of Maryland furnishes the most apposite example. The Senate of that State is elected, as the federal Senate will be, indirectly by the people, and for a term less by one year only than the federal Senate. It is distinguished, also, by the remarkable prerogative of filling up its own vacancies within the term of its appointment, and, at the same time, is not under the control of any such rotation as is provided for the federal Senate. There are some other lesser distinctions, which would expose the former to colorable objections that do not lie against the latter. If the federal Senate, therefore, really contained the danger which has been so loudly proclaimed, some symptoms at least of a like danger ought by this time to have been betrayed by the Senate of Maryland, but no such symptoms have appeared. On the contrary, the jealousies at first entertained by men of the same description with those who view with terror the correspondent part of the federal Constitution have been gradually extinguished by the progress of the experiment, and the Maryland constitution is daily deriving from the salutary operation of this part of it a reputation in which it will probably not be rivaled by that of any State in the Union.[1]

[1] Almost alone of the states, Maryland had refused to issue paper money after the Revolution, a refusal due entirely to her Senate, which twice negatived a bill passed by the lower house. The controversy was argued in "The Present State of Maryland, by the Delegates of the People," Baltimore, 1786, which reads not unlike many of the current declamations against the national Senate for its resistance to the will of the people.—EDITOR.

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But if anything could silence the jealousies on this subject, it ought to be the British example. The Senate there, instead of being elected for a term of six years, and of being unconfined to particular families or fortunes, is an hereditary assembly of opulent nobles. The House of Representatives, instead of being elected for two years, and by the whole body of the people, is elected for seven years, and, in very great proportion, by a very small proportion of the people. Here, unquestionably, ought to be seen in full display the aristocratic usurpations and tyranny which are at some future period to be exemplified in the United States. Unfortunately, however, for the anti-federal argument, the British history informs us that this hereditary assembly has not been able to defend itself against the continual encroachments of the House of Representatives; and that it no sooner lost the support of the monarch than it was actually crushed by the weight of the popular branch.[1]

As far as antiquity can instruct us on this subject, its examples support the reasoning which we have employed. In Sparta the Ephori, the annual representatives of the people, were found an overmatch for the senate for life, continually gained on its authority, and finally drew all power into their own hands. The Tribunes of Rome, who were the representatives of the people, prevailed, it is well known, in almost every contest with the senate for life, and in the end gained the most complete triumph over it. The fact is the more remarkable as unanimity was required in every act of the Tribunes, even after their number was augmented to ten. It proves the irresistible force possessed by that branch of a free government which has the people on its side. To these examples might be added that of Carthage, whose senate, according to the testimony of Polybius, instead of drawing all power into its vortex, had, at the commencement of the second Punic War, lost almost the whole of its original portion.

Besides the conclusive evidence resulting from this assemblage of facts that the federal Senate will never be

[1] In Bagehot's "English Constitution" he discusses at some length the question of the time at which the House of Lords "must yield" to the Commons, and reaches the singularly stultifying conclusion to his main argument that it is "whenever the opinion of the Commons is also the opinion of the nation."—EDITOR.

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able to transform itself by gradual usurpations into an independent and aristocratic body, we are warranted in believing that, if such a revolution should ever happen from causes which the foresight of man cannot guard against, the House of Representatives, with the people on their side, will at all times be able to bring back the Constitution to its primitive form and principles. Against the force of the immediate representatives of the people, nothing will be able to maintain even the constitutional authority of the Senate but such a display of enlightened policy and attachment to the public good as will divide with that branch of the legislature the affections and support of the entire body of the people themselves.

PUBLIUS.

No. 64 [63]. (*New York Packet*, March 7, 1788.) **Jay.**

TREATY-MAKING POWER OF THE SENATE.

The treaty-making power—Importance of this power—Property vested in the Senate—A popular body not fit for this power—Reasons—Objections to this power in the Senate considered, and reasons for their rejection enumerated—The responsibility of senators.

To the People of the State of New York:

It is a just and not a new observation that enemies to particular persons, and opponents to particular measures, seldom confine their censures to such things only in either as are worthy of blame. Unless on this principle, it is difficult to explain the motives of their conduct who condemn the proposed Constitution in the aggregate and treat with severity some of the most unexceptionable articles in it.

The second section gives power to the President, "*by and with the advice and consent of the Senate, to make treaties*, PROVIDED TWO-THIRDS OF THE SENATORS PRESENT CONCUR."

The power of making treaties is an important one, especially as it relates to war, peace, and commerce;

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and it should not be delegated but in such a mode, and with such precautions, as will afford the highest security that it will be exercised by men the best qualified for the purpose and in the manner most conducive to the public good. The convention appears to have been attentive to both these points: they have directed the President to be chosen by select bodies of electors, to be deputed by the people for that express purpose; and they have committed the appointment of senators to the State legislatures. This mode has, in such cases, vastly the advantage of elections by the people in their collective capacity, where the activity of party zeal, taking advantage of the supineness, the ignorance, and the hopes and fears of the unwary and interested, often places men in office by the votes of a small proportion of the electors.

As the select assemblies for choosing the President, as well as the State legislatures who appoint the senators, will in general be composed of the most enlightened and respectable citizens, there is reason to presume that their attention and their votes will be directed to those men only who have become the most distinguished by their abilities and virtue, and in whom the people perceive just grounds for confidence. The Constitution manifests very particular attention to this object. By excluding men under thirty-five from the first office, and those under thirty from the second, it confines the electors to men of whom the people have had time to form a judgment, and with respect to whom they will not be liable to be deceived by those brilliant appearances of genius and patriotism which, like transient meteors, sometimes mislead as well as dazzle. If the observation be well founded that wise kings will always be served by able ministers, it is fair to argue that, as an assembly of select electors possess in a greater degree than kings the means of extensive and accurate information relative to men and characters, so will their appointments bear at least equal marks of discretion and discernment. The inference which naturally results from these considerations is this, that the President and

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senators so chosen will always be of the number of those who best understand our national interests, whether considered in relation to the several States or to foreign nations; who are best able to promote those interests, and whose reputation for integrity inspires and merits confidence. With such men the power of making treaties may be safely lodged.

Although the absolute necessity of system, in the conduct of any business, is universally known and acknowledged, yet the high importance of it in national affairs has not yet become sufficiently impressed on the public mind. They who wish to commit the power under consideration to a popular assembly, composed of members constantly coming and going in quick succession, seem not to recollect that such a body must necessarily be inadequate to the attainment of those great objects which require to be steadily contemplated in all their relations and circumstances, and which can only be approached and achieved by measures which not only talents, but also exact information, and often much time, are necessary to concert and to execute. It was wise, therefore, in the convention to provide, not only that the power of making treaties should be committed to able and honest men, but also that they should continue in place a sufficient time to become perfectly acquainted with our national concerns and to form and introduce a system for the management of them. The duration prescribed is such as will give them an opportunity of greatly extending their political information, and of rendering their accumulating experience more and more beneficial to their country. Nor has the convention discovered less prudence in providing for the frequent elections of senators in such a way as to obviate the inconvenience of periodically transferring those great affairs entirely to new men; for by leaving a considerable residue of the old ones in place, uniformity and order, as well as a constant succession of official information, will be preserved.

There are a few who will not admit that the affairs of

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trade and navigation should be regulated by a system cautiously formed and steadily pursued, and that both our treaties and our laws should correspond with and be made to promote it. It is of much consequence that this correspondence and conformity be carefully maintained; and they who assent to the truth of this position will see and confess that it is well provided for by making concurrence of the Senate necessary both to treaties and to laws.

It seldom happens in the negotiation of treaties, of whatever nature, but that perfect *secrecy* and immediate *dispatch* are sometimes requisite.[1] There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular Assembly. The convention have done well, therefore, in so disposing of the power of making treaties that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such a manner as prudence may suggest.

They who have turned their attention to the affairs of men must have perceived that there are tides in them; tides very irregular in their duration, strength, and direction, and seldom found to run twice exactly in the same manner or measure. To discern and to profit by these tides in national affairs is the business of those who preside over them; and they who have had much experience on this head inform us that there frequently are

[1] To this day treaties are discussed in "secret session," although the time has long since gone by when diplomacy required any extraordinary secrecy. Bagehot criticises the Senate for retaining this system, and asserts that England would "have a manlier and plainer way of dealing with foreign policy if ministers were obliged to explain clearly their foreign contracts before they were valid, just as they have to explain their domestic proposals before they can become laws."—EDITOR.

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occasions when days, nay, even when hours, are precious. The loss of a battle, the death of a prince, the removal of a minister, or other circumstances intervening to change the present posture and aspect of affairs, may turn the most favorable tide into a course opposite to our wishes. As in the field, so in the cabinet, there are moments to be seized as they pass, and they who preside in either should be left in capacity to improve them. So often and so essentially have we heretofore suffered from the want of secrecy and dispatch that the Constitution would have been inexcusably defective if no attention had been paid to those objects. Those matters which in negotiations usually require the most secrecy and the most dispatch are those preparatory and auxiliary measures which are not otherwise important in a national view than as they tend to facilitate the attainment of the objects of the negotiation. For these the President will find no difficulty to provide; and should any circumstance occur which requires the advice and consent of the Senate, he may at any time convene them. Thus we see that the Constitution provides that our negotiations for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations, on the one hand, and from secrecy and dispatch, on the other.

But to this plan, as to most others that have ever appeared, objections are contrived and urged.

Some are displeased with it, not on account of any errors or defects in it, but because, as the treaties, when made, are to have the force of laws, they should be made only by men invested with legislative authority. These gentlemen seem not to consider that the judgments of our courts, and the commissions constitutionally given by our governor, are as valid and as binding on all persons whom they concern as the laws passed by our legislature. All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature; and therefore, whatever name be given

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to the power of making treaties, or however obligatory they may be when made, certain it is that the people may with much propriety commit the power to a distinct body from the legislature, the executive, or the judicial. It surely does not follow, that because they have given the power of making laws to the legislature, that therefore they should likewise give them power to do every other act of sovereignty by which the citizens are to be bound and affected.

Others, though content that treaties should be made in the mode proposed, are averse to their being the *supreme* laws of the land. They insist and profess to believe that treaties, like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it. They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both; and, consequently, that as the consent of both was essential to their formation at first, so must it ever afterward be to alter or cancel them. The proposed Constitution, therefore, has not in the least extended the obligation of treaties. They are just as binding, and just as far beyond the lawful reach of legislative acts now, as they will be at any future period or under any form of government.

However useful jealousy may be in republics, yet when, like bile in the natural, it abounds too much in the body politic, the eyes of both become very liable to be deceived by the delusive appearances which that malady casts on surrounding objects. From this cause, probably, proceed the fears and apprehensions of some that the President and Senate may make treaties without an equal eye to the

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interests of all the States. Others suspect that two-thirds will oppress the remaining third, and ask whether those gentlemen are made sufficiently responsible for their conduct; whether, if they act corruptly, they can be punished; and if they make disadvantageous treaties, how are we to get rid of those treaties?

As all the States are equally represented in the Senate, and by men the most able and the most willing to promote the interests of their constituents, they will all have an equal degree of influence in that body, especially while they continue to be careful in appointing proper persons and to insist on their punctual attendance. In proportion as the United States assume a national form and a national character, so will the good of the whole be more and more an object of attention, and the government must be a weak one indeed, if it should forget that the good of the whole can only be promoted by advancing the good of each of the parts or members which compose the whole. It will not be in the power of the President and Senate to make any treaties by which they and their families and estates will not be equally bound and affected with the rest of the community; and, having no private interests distinct from that of the nation, they will be under no temptations to neglect the latter.

As to corruption, the case is not supposable. He must either have been very unfortunate in his intercourse with the world, or possess a heart very susceptible of such impressions, who can think it probable that the President and two-thirds of the Senate will ever be capable of such unworthy conduct. The idea is too gross and too invidious to be entertained. But in such a case, if it should ever happen, the treaty so obtained from us would, like all other fraudulent contracts, be null and void by the law of nations.

With respect to their responsibility, it is difficult to conceive how it could be increased. Every consideration that can influence the human mind, such as honor, oaths, reputations, conscience, the love of country, and

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family affections and attachments, afford security for their fidelity. In short, as the Constitution has taken the utmost care that they shall be men of talents and integrity, we have reason to be persuaded that the treaties they make will be as advantageous as, all circumstances considered, could be made; and so far as the fear of punishment and disgrace can operate, that motive to good behavior is amply afforded by the article on the subject of impeachments.

PUBLIUS.

No. 65 [64]. (*New York Packet*, March 7, 1788.) Hamilton.

IMPEACHMENT POWER OF THE SENATE.

The appointment of public officers—The authority to sit as a court in the trial of impeachments—Difficulty of forming such a court—The Senate most fit for such a trust—The plan of delegating this authority to the supreme court considered and rejected—The propriety of uniting the supreme court in this power with the Senate considered and denied—The propriety of giving this authority to other persons disconnected with any department of the government considered and denied—Even if this power in the Senate is not desirable, the constitution should not be rejected.

To the People of the State of New York:

The remaining powers which the plan of the convention allots to the Senate, in a distinct capacity, are comprised in their participation with the executive in the appointment to offices, and in their judicial character as a court for the trial of impeachments. As in the business of appointments the executive will be the principal agent, the provisions relating to it will most properly be discussed in the examination of that department. We will, therefore, conclude this head with a view of the judicial character of the Senate.

A well-constituted court for the trial of impeachments is an object not more to be desired than difficult to be obtained in a government wholly elective. The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from

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the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself. The prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. In many cases it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other; and in such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties than by the real demonstrations of innocence or guilt.[1]

The delicacy and magnitude of a trust which so deeply concerns the political reputation and existence of every man engaged in the administration of public affairs speak for themselves. The difficulty of placing it rightly in a government resting entirely on the basis of periodical elections will as readily be perceived, when it is considered that the most conspicuous characters in it will, from that circumstance, be too often the leaders or the tools of the most cunning or the most numerous faction, and on this account can hardly be expected to possess the requisite neutrality towards those whose conduct may be the subject of scrutiny.

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[1] The history of impeachment has proved this to a deplorable degree. Of the seven impeachment trials actually conducted by the Senate but two convictions have resulted, that of Judge Humphreys in 1862 and of Judge Pickering in 1803. In the latter case the fact of insanity enters as a mitigating feature. In the case of Blount, in 1797, the Senate sustained the plea of counsel that Blount, having been expelled from the Senate, was not subject to the process of impeachment. In every attempted impeachment involving political questions, the most intense party heats have been aroused, and owing to this the two-thirds vote necessary to convict has never been obtained. The power has recently been likened to a "sword rusted in its scabbard," but this is an overstatement. If, as yet, there has been no great use of the power, it is due more to the fortunate lack of occasion than to any loss of inherent potency. The dread of impeachment, necessarily felt by every public officer, must also be reckoned in as a valuable deterrent. The whole history of national impeachment trials is admirably given in Roger Foster's "Commentaries on the Constitution," i. 505.—EDITOR.

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The convention, it appears, thought the Senate the most fit depositary of this important trust. Those who can best discern the intrinsic difficulty of the thing will be least hasty in condemning that opinion, and will be most inclined to allow due weight to the arguments which may be supposed to have produced it.

What, it may be asked, is the true spirit of the institution itself? Is it not designed as a method of NATIONAL INQUEST into the conduct of public men? If this be the design of it, who can so properly be the inquisitors for the nation as the representatives of the nation themselves? It is not disputed that the power of originating the inquiry, or, in other words, of preferring the impeachment, ought to be lodged in the hands of one branch of the legislative body. Will not the reasons which indicate the propriety of this arrangement strongly plead for an admission of the other branch of that body to a share of the inquiry? The model from which the idea of this institution has been borrowed pointed out that course to the convention. In Great Britain it is the province of the House of Commons to prefer the impeachment and of the House of Lords to decide upon it. Several of the State constitutions have followed the example. As well the latter, as the former, seem to have regarded the practice of impeachments as a bridle in the hands of the legislative body upon the executive servants of the government. Is not this the true light in which it ought to be regarded?

Where else than in the Senate could have been found a tribunal sufficiently dignified or sufficiently independent? What other body would be likely to feel *confidence enough in its own situation* to preserve, unawed and uninfluenced, the necessary impartiality between an *individual* accused and the *representatives of the people, his accusers?*

Could the Supreme Court have been relied upon as answering this description? It is much to be doubted whether the members of that tribunal would at all times be endowed with so eminent a portion of fortitude as would be called for in the execution of so difficult a task;

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and it is still more to be doubted whether they would possess the degree of credit and authority which might, on certain occasions, be indispensable towards reconciling the people to a decision that should happen to clash with an accusation brought by their immediate representatives.[1] A deficiency in the first would be fatal to the accused; in the last, dangerous to the public tranquillity. The hazard, in both these respects, could only be avoided, if at all, by rendering that tribunal more numerous than would consist with a reasonable attention to economy. The necessity of a numerous court for the trial of impeachments is equally dictated by the nature of the proceeding. This can never be tied down by such strict rules, either in the delineation of the offense by the prosecutors, or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor of personal security. There will be no jury to stand between the judges who are to pronounce the sentence of the law and the party who is to receive or suffer it. The awful discretion which a court of impeachments must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons.

These considerations seem alone sufficient to authorize a conclusion that the Supreme Court would have been an improper substitute for the Senate, as a court of impeachments. There remains a further consideration, which will not a little strengthen this conclusion. It is this: The punishment which may be the consequence of conviction upon impeachment is not to terminate the

[1] This makes singular reading in view of the present public estimation of the supreme court, and the unequaled obedience, with or without respect, accorded to its decisions. Yet on a consideration of the unpopularity of the court after it had been federalized, when it rendered the Dred Scott decision, and recently, when it was attacked in the platform of a party which cast several million votes, it is obvious that the introduction into it, as already indicated, of what have usually been party questions, by giving the court the power of trying impeachments, might have gone far to destroy the very obedience above noted.—EDITOR.

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chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law. Would it be proper that the persons who had disposed of his fame and his most valuable rights as a citizen in one trial should, in another trial for the same offense, be also the disposers of his life and his fortune? Would there not be the greatest reason to apprehend that error in the first sentence would be the parent of error in the second sentence? That the strong bias of one decision would be apt to overrule the influence of any new lights which might be brought to vary the complexion of another decision? Those who know anything of human nature will not hesitate to answer these questions in the affirmative, and will be at no loss to perceive that, by making the same persons judges in both cases, those who might happen to be the objects of prosecution would in a great measure be deprived of the double security intended them by a double trial. The loss of life and estate would often be virtually included in a sentence which in its terms imported nothing more than dismission from a present, and disqualification for a future, office. It may be said that the intervention of a jury in the second instance would obviate the danger. But juries are frequently influenced by the opinions of judges. They are sometimes induced to find special verdicts, which refer the main question to the decision of the court. Who would be willing to stake his life and his estate upon the verdict of a jury acting under the auspices of judges who had predetermined his guilt?

Would it have been an improvement of the plan to have united the Supreme Court with the Senate, in the formation of the court of impeachments? This union would certainly have been attended with several advantages; but would they not have been overbalanced by the signal disadvantage, already stated, arising from the agency of the same judges in the double prosecution to

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which the offender would be liable? To a certain extent the benefits of that union will be obtained from making the chief justice of the Supreme Court the president of the court of impeachments, as is proposed to be done in the plan of the convention; while the inconveniences of an entire incorporation of the former into the latter will be substantially avoided. This was perhaps the prudent mean. I forbear to remark upon the additional pretext for clamor against the judiciary which so considerable an augmentation of its authority would have afforded.

Would it have been desirable to have composed the court for the trial of impeachments of persons wholly distinct from the other departments of the government? There are weighty arguments, as well against, as in favor of, such a plan. To some minds it will not appear a trivial objection that it could tend to increase the complexity of the political machine, and to add a new spring to the government the utility of which would at best be questionable. But an objection which will not be thought by any unworthy of attention is this: a court formed upon such a plan would either be attended with a heavy expense or might in practice be subject to a variety of casualities and inconveniences. It must either consist of permanent officers, stationary at the seat of government, and of course entitled to fixed and regular stipends, or of certain officers of the State governments, to be called upon whenever an impeachment was actually depending. It will not be easy to imagine any third mode materially different, which could rationally be proposed. As the court, for reasons already given, ought to be numerous, the first scheme will be reprobated by every man who can compare the extent of the public wants with the means of supplying them. The second will be espoused with caution by those who will seriously consider the difficulty of collecting men dispersed over the whole Union; the injury to the innocent from the procrastinated determination of the charges which might be brought against them; the advantage to the guilty from the opportunities which delay would afford to in-

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trigue and corruption; and in some cases the detriment to the State from the prolonged inaction of men whose firm and faithful execution of their duty might have exposed them to the persecution of an intemperate or designing majority in the House of Representatives. Though this latter supposition may seem harsh, and might not be likely often to be verified, yet it ought not to be forgotten that the demon of faction will, at certain seasons, extend his scepter over all numerous bodies of men.

But though one or the other of the substitutes which have been examined, or some other that might be devised, should be thought preferable to the plan, in this respect, reported by the convention, it will not follow that the Constitution ought for this reason to be rejected. If mankind were to resolve to agree in no institution of government until every part of it had been adjusted to the most exact standard of perfection, society would soon become a general scene of anarchy and the world a desert. Where is the standard of perfection to be found? Who will undertake to unite the discordant opinions of a whole community in the same judgment of it; and to prevail upon one conceited projector to renounce his *infallible* criterion for the *fallible* criterion of his more *conceited neighbor?* To answer the purpose of the adversaries of the Constitution they ought to prove, not merely that particular provisions in it are not the best which might have been imagined, but that the plan upon the whole is bad and pernicious.

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No. 66 [65]. (*Independent Journal*, March 8, 1788.) Hamilton.

OBJECTION TO THE IMPEACHMENT POWER OF THE SENATE BECAUSE A JUDICIAL POWER.

Objection that it unites legislative and judicial functions—This same provision in constitution of New York which opposition admire—That it unduly accumulates power in the Senate, and tends to the establishment of an aristocracy—That the senate will judge too leniently officers for whose confirmation it has voted—That the senators may be called upon to try themselves for a corrupt use of the treaty-making power.

To the People of the State of New York:

A review of the principal objections that have appeared against the proposed court for the trial of impeachments will not improbably eradicate the remains of any unfavorable impressions which may still exist in regard to this matter.

The *first* of these objections is that the provision in question confounds legislative and judiciary authorities in the same body, in violation of that important and well-established maxim which requires a separation between the different departments of power. The true meaning of this maxim has been discussed and ascertained in another place and has been shown to be entirely compatible with a partial intermixture of those departments for special purposes, preserving them, in the main, distinct and unconnected. This partial intermixture is even, in some cases, not only proper, but necessary to the mutual defense of the several members of the government against each other. An absolute or qualified negative in the executive upon the acts of the legislative body is admitted by the ablest adepts in political science to be an indispensable barrier against the encroachments of the latter upon the former. And it may, perhaps, with no less reason, be contended that the powers relating to impeachments are, as before intimated, an essential check in the hands of that body upon the encroachments of the executive. The division of them between the two branches of the legislature—

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assigning to one the right of accusing, to the other the right of judging—avoids the inconvenience of making the same persons both accusers and judges, and guards against the danger of persecution from the prevalency of a factious spirit in either of those branches. As the concurrence of two-thirds of the Senate will be requisite to a condemnation, the security to innocence from this additional circumstance will be as complete as itself can desire.

It is curious to observe with what vehemence this part of the plan is assailed on the principle here taken notice of, by men who profess to admire, without exception, the constitution of this State; while that constitution makes the Senate, together with the chancellor and judges of the Supreme Court, not only a court of impeachments, but the highest judicatory in the State in all causes, civil and criminal. The proportion, in point of numbers, of the chancellor and judges to the senators is so inconsiderable that the judiciary authority of New York, in the last resort, may with truth be said to reside in its Senate. If the plan of the convention be in this respect chargeable with a departure from the celebrated maxim which has been so often mentioned, and seems to be so little understood, how much more culpable must be the constitution of New York!*

A *second* objection to the Senate as a court of impeachments is that it contributes to an undue accumulation of power in that body, tending to give to the government a countenance too aristocratic. The Senate, it is observed, is to have concurrent authority with the Executive in the formation of treaties and in the appointment to offices: if, say the objectors, to these prerogatives is added that of deciding in all cases of impeachment, it will give a decided predominancy to senatorial influence. To an objection so little precise in itself it is not easy

*In that of New Jersey, also, the final judiciary authority is in a branch of the legislature. In New Hampshire, Massachusetts, Pennsylvania, and South Carolina, one branch of the legislature is the court for the trial of impeachments.—PUBLIUS.

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to find a very precise answer. Where is the measure or criterion to which we can appeal for determining what will give the Senate too much, too little, or barely the proper degree of influence? Will it not be more safe, as well as more simple, to dismiss such vague and uncertain calculations; to examine each power by itself; and to decide, on general principles, where it may be deposited with most advantage and least inconvenience?

If we take this course, it will lead to a more intelligible, if not to a more certain result. The disposition of the power of making treaties, which has obtained in the plan of the convention, will then, if I mistake not, appear to be fully justified by the considerations stated in a former number, and by others which will occur under the next head of our inquiries. The expediency of the junction of the Senate with the Executive in the power of appointing to offices will, I trust, be placed in a light not less satisfactory, in the disquisitions under the same head. And I flatter myself the observations in my last paper must have gone no inconsiderable way toward proving that it was not easy, if practicable, to find a more fit receptacle for the power of determining impeachments than that which has been chosen. If this be truly the case, the hypothetical dread of the too great weight of the Senate ought to be discarded from our reasonings.

See No. 64.

See Nos. 68 and 75.

But this hypothesis, such as it is, has already been refuted in the remarks applied to the duration in office prescribed for the senators. It was by them shown, as well on the credit of historical examples as from the reason of the thing, that the most *popular* branch of every government partaking of the republican genius, by being generally the favorite of the people, will be as generally a full match, if not an overmatch, for every other member of the government.

But independent of this most active and operative principle, to secure the equilibrium of the national House of Representatives, the plan of the convention has provided in its favor several important counterpoises to the

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additional authorities to be conferred upon the Senate. The exclusive privilege of originating money bills will belong to the House of Representatives. The same house will possess the sole right of instituting impeachments: is not this a complete counterbalance to that of determining them? The same house will be the umpire in all elections of the President which do not unite the suffrages of a majority of the whole number of electors; a case which it cannot be doubted will sometimes, if not frequently, happen. The constant possibility of the thing must be a fruitful source of influence to that body. The more it is contemplated, the more important will appear this ultimate though contingent power of deciding the competitions of the most illustrious citizens of the Union for the first office in it. It would not perhaps be rash to predict that, as a mean of influence, it will be found to outweigh all the peculiar attributes of the Senate.

A *third* objection to the Senate as a court of impeachments is drawn from the agency they are to have in the appointments to office. It is imagined that they would be too indulgent judges of the conduct of men in whose official creation they had participated. The principle of this objection would condemn a practice which is to be seen in all the State governments, if not in all the governments with which we are acquainted: I mean that of rendering those who hold offices during pleasure dependent on the pleasure of those who appoint them. With equal plausibility might it be alleged in this case that the favoritism of the latter would always be an asylum for the misbehavior of the former. But that practice, in contradiction to this principle, proceeds upon the presumption that the responsibility of those who appoint for the fitness and competency of the persons on whom they bestow their choice, and the interest they will have in the respectable and prosperous administration of affairs, will inspire a sufficient disposition to dismiss from a share in it all such who by their conduct shall have proved themselves unworthy of the confidence reposed in

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them. Though facts may not always correspond with this presumption, yet if it be in the main just, it must destroy the supposition that the Senate, who will merely sanction the choice of the Executive, should feel a bias towards the objects of that choice strong enough to blind them to the evidences of guilt so extraordinary as to have induced the representatives of the nation to become its accusers.

If any further arguments were necessary to evince the improbability of such a bias, it might be found in the nature of the agency of the Senate in the business of appointments.

It will be the office of the President to *nominate* and, with the advice and consent of the Senate, to *appoint*. There will, of course, be no exertion of *choice* on the part of the Senate. They may defeat one choice of the Executive and oblige him to make another; but they cannot themselves *choose*—they can only ratify or reject the choice of the President. They might even entertain a preference to some other person at the very moment they were assenting to the one proposed, because there might be no positive ground of opposition to him; and they could not be sure, if they withheld their assent, that the subsequent nomination would fall upon their own favorite, or upon any other person in their estimation more meritorious than the one rejected. Thus it could hardly happen that the majority of the Senate would feel any other complacency towards the object of an appointment than such as the appearances of merit might inspire and the proofs of the want of it destroy.[1]

See No. 76.

A *fourth* objection to the Senate, in the capacity of a

[1] Hamilton did not foresee such a condition as the rejection of Van Buren as minister to England in 1832 by a vote arranged to make a tie so that Vice President Calhoun could make his casting vote a matter of personal "vengeance" against the President. Nor did Hamilton foresee the development of the so-called "senatorial courtesy," by means of which senators have been able to obtain the rejection by the Senate of many appointments, solely because the nominee was disliked or opposed to the senator of his state.—EDITOR.

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court of impeachments, is derived from its union with the Executive in the power of making treaties. This, it has been said, would constitute the senators their own judges, in every case of a corrupt or perfidious execution of that trust. After having combined with the Executive in betraying the interests of the nation in a ruinous treaty, what prospect, it is asked, would there be of their being made to suffer the punishment they would deserve, when they were themselves to decide upon the accusation brought against them for the treachery of which they have been guilty?

This objection has been circulated with more earnestness and with greater show of reason than any other which has appeared against this part of the plan; and yet I am deceived if it does not rest upon an erroneous foundation.

The security essentially intended by the Constitution against corruption and treachery in the formation of treaties is to be sought for in the numbers and characters of those who are to make them. The JOINT AGENCY of the Chief Magistrate of the Union, and of two-thirds of the members of a body selected by the collective wisdom of the legislatures of the several States, is designed to be the pledge for the fidelity of the national councils in this particular. The convention might with propriety have meditated the punishment of the Executive for a deviation from the instructions of the Senate, or a want of integrity in the conduct of the negotiations committed to him; they might also have had in view the punishment of a few leading individuals in the Senate, who should have prostituted their influence in that body as the mercenary instruments of foreign corruption: but they could not, with more or with equal propriety, have contemplated the impeachment and punishment of two-thirds of the Senate, consenting to an improper treaty, than of a majority of that or of the other branch of the national legislature consenting to a pernicious or unconstitutional law—a principle which, I believe, has never been admitted into

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ny government. How, in fact, could a majority in the House of Representatives impeach themselves? Not better, it is evident, than two-thirds of the Senate might try themselves. And yet what reason is there that a majority of the House of Representatives, sacrificing the interests of the society by an unjust and tyrannical act of legislation, should escape with impunity more than two-thirds of the Senate, sacrificing the same interests in an injurious treaty with a foreign power? The truth is that in all such cases it is essential to the freedom and to the necessary independence of the deliberations of the body, that the members of it should be exempt from punishment for acts done in a collective capacity; and the security to the society must depend on the care which is taken to confide the trust to proper hands, to make it their interest to execute it with fidelity, and to make it as difficult as possible for them to combine in any interest opposite to that of the public good.

So far as might concern the misbehavior of the Executive in perverting the instructions or contravening the views of the Senate, we need not be apprehensive of the want of a disposition in that body to punish the abuse of their confidence or to vindicate their own authority. We may thus far count upon their pride, if not upon their virtue. And so far even as might concern the corruption of leading members, by whose arts and influence the majority may have been inveigled into measures odious to the community, if the proofs of that corruption should be satisfactory, the usual propensity of human nature will warrant us in concluding that there would be commonly no defect of inclination in the body to divert the public resentment from themselves by a ready sacrifice of the authors of their mismanagement and disgrace.

PUBLIUS.

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No. 67 [66]. (*New York Packet*, March 11, 1788.) Hamilton

THE EXECUTIVE DEPARTMENT.

Difficulties in constituting—Exaggeration of powers—Misrepresentation concerning vacancies in Senate by Cato.

To the People of the State of New York:

The constitution of the executive department of the proposed government claims next our attention.

There is hardly any part of the system which could have been attended with greater difficulty in the arrangement of it than this; and there is, perhaps, none which has been inveighed against with less candor or criticised with less judgment.

Here the writers against the Constitution seem to have taken pains to signalize their talent of misrepresentation. Calculating upon the aversion of the people to monarchy, they have endeavored to enlist all their jealousies and apprehensions in opposition to the intended President of the United States; not merely as the embryo, but as the full-grown progeny, of that detested parent. To establish the pretended affinity, they have not scrupled to draw resources even from the regions of fiction. The authorities of a magistrate, in few instances greater, in some instances less, than those of a governor of New York, have been magnified into more than royal prerogatives. He has been decorated with attributes superior in dignity and splendor to those of a king of Great Britain. He has been shown to us with the diadem sparkling on his brow and the imperial purple flowing in his train. He has been seated on a throne surrounded with minions and mistresses, giving audience to the envoys of foreign potentates, in all the supercilious pomp of majesty. The images of Asiatic despotism and voluptuousness have scarcely been wanting to crown the exaggerated scene. We have been taught to tremble at the terrific visages of murdering janizaries, and to blush at the unveiled mysteries of a future seraglio.

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Attempts so extravagant as these to disfigure or, it might rather be said, to metamorphose the object, render it necessary to take an accurate view of its real nature and form: in order as well to ascertain its true aspect and genuine appearance as to unmask the disingenuity and expose the fallacy of the counterfeit resemblances which have been so insidiously, as well as industriously, propagated.

In the execution of this task, there is no man who would not find it an arduous effort either to behold with moderation or to treat with seriousness the devices, not less weak than wicked, which have been contrived to pervert the public opinion in relation to the subject. They so far exceed the usual though unjustifiable licenses of party artifice that, even in a disposition the most candid and tolerant, they must force the sentiments which favor an indulgent construction of the conduct of political adversaries to give place to a voluntary and unreserved indignation. It is impossible not to bestow the imputation of deliberate imposture and deception upon the gross pretense of a similitude between a king of Great Britain and a magistrate of the character marked out for that of the President of the United States. It is still more impossible to withhold that imputation from the rash and barefaced expedients which have been employed to give success to the attempted imposition.

See No. 69.

In one instance, which I cite as a sample of the general spirit, the temerity has proceeded so far as to ascribe to the President of the United States a power which by the instrument reported is *expressly* allotted to the Executives of the individual States. I mean the power of filling casual vacancies in the Senate.

This bold experiment upon the discernment of his countrymen has been hazarded by a writer who (whatever may be his real merit) has had no inconsiderable share in the applauses of his party;*[1] and who, upon this false and unfounded suggestion, has built a series of observations equally false and unfounded. Let him now be confronted with the evidence of the fact, and let him,

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* See CATO, No. V.—PUBLIUS.

[1] See Ford's "Essays on the Constitution," p. 268.—EDITOR.

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if he be able, justify or extenuate the shameful outrage he has offered to the dictates of truth and to the rules of fair dealing.

The second clause of the second section of the second article empowers the President of the United States "to nominate, and by and with the advice and consent of the Senate, to appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other *officers* of the United States whose appointments are *not* in the Constitution *otherwise provided for*, and *which shall be established by law.*" Immediately after this clause follows another in these words: "The President shall have power to fill up all *vacancies* that may happen *during the recess of the Senate*, by granting commissions which shall *expire at the end of their next session.*" It is from this last provision that the pretended power of the President to fill vacancies in the Senate has been deduced. A slight attention to the connection of the clauses, and to the obvious meaning of the terms, will satisfy us that the deduction is not even colorable.

The first of these two clauses, it is clear, only provides a mode for appointing such officers, "whose appointments are *not otherwise provided for* in the Constitution, and which *shall be established by law.*" Of course it cannot extend to the appointments of senators, whose appointments are *otherwise provided for* in the Constitution,* and who are *established by the Constitution*, and will not require a future establishment by law. This position will hardly be contested.

The last of these two clauses, it is equally clear, cannot be understood to comprehend the power of filling vacancies in the Senate, for the following reasons: *First.* The relation in which that clause stands to the other, which declares the general mode of appointing officers of the United States denotes it to be nothing more than a supplement to the other for the purpose of establishing an auxiliary method of appointment in cases to which the general method was inadequate. The ordinary power of appointment is confined to the President and Senate *jointly*, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers, and as vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorize the President, *singly*, to make temporary appointments "during the recess of the Senate, by granting commissions which shall expire at the end of their next session." *Secondly.* If this

*Article I. section 3, clause 1.—PUBLIUS.

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clause is to be considered as supplementary to the one which precedes, the *vacancies* of which it speaks must be construed to relate to the "officers" described in the preceding one; and this, we have seen, excludes from its description the members of the Senate. *Thirdly*. The time within which the power is to operate, "during the recess of the Senate," and the duration of the appointments, "to the end of the next session" of that body, conspire to elucidate the sense of the provision which, if it had been intended to comprehend senators, would naturally have referred the temporary power of filling vacancies to the recess of the State legislatures, who are to make the permanent appointments, and not to the recess of the national Senate, who are to have no concern in those appointments; and would have extended the duration in office of the temporary senators to the next session of the legislature of the State, in whose representation the vacancies had happened, instead of making it to expire at the end of the ensuing session of the national Senate. The circumstances of the body authorized to make the permanent appointments would, of course, have governed the modification of a power which related to the temporary appointments; and as the national Senate is the body whose situation is alone contemplated in the clause upon which the suggestion under examination has been founded, the vacancies to which it alludes can only be deemed to respect those officers in whose appointment that body has a concurrent agency with the President. But *lastly*, the first and second clauses of the third section of the first article not only obviate all possibility of doubt, but destroy the pretext of misconception. The former provides that "the Senate of the United States shall be composed of two Senators from each State, chosen *by the legislature thereof* for six years"; and the latter directs that, "if vacancies in that body should happen by resignation or otherwise, *during the recess of the legislature of* ANY STATE, the Executive THEREOF may make temporary appointments until the *next meeting of the legislature*, which shall then fill such vacancies." Here is an express power given in clear and unambiguous terms to the State Executives, to fill casual vacancies in the Senate by temporary appointments; which not only invalidates the supposition that the clause before considered could have been intended to confer that power upon the President of the United States, but proves that this supposition, destitute as it is even of the merit of plausibility, must have originated in an intention to deceive the people, too palpable to be obscured by sophistry, too atrocious to be palliated by hypocrisy.

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I have taken the pains to select this instance of misrepresentation, and to place it in a clear and strong light, as an unequivocal proof of the unwarrantable arts which are practiced to prevent a fair and impartial judgment of the real merits of the Constitution submitted to the consideration of the people. Nor have I scrupled, in so flagrant a case, to allow myself a severity of animadversion little congenial with the general spirit of these papers. I hesitate not to submit it to the decision of any candid and honest adversary of the proposed government, whether language can furnish epithets of too much asperity for so shameless and so prostitute an attempt to impose on the citizens of America.

PUBLIUS.

No. 68 [67]. (*Independent Journal*, March 12, 1788.) Hamilton.

METHOD OF APPOINTING THE PRESIDENT.

The only part of the constitution not condemned by its opponents—It is well guarded—Desirable to have the sense of the people in the choice—Desirable that the choice be made by competent persons, as in the electoral college; to avoid tumult and disorder; to avoid intrigue and corruption; to maintain the President independent of all but the people—All these advantages here combined—Choice will seldom fall on one not qualified—The choice of a Vice President by the people considered and approved.

To the People of the State of New York:

The mode of appointment of the Chief Magistrate of the United States is almost the only part of the system, of any consequence, which has escaped without severe censure, or which has received the slightest mark of approbation from its opponents. The most plausible of these who has appeared in print has even deigned to admit that the election of the President is pretty well guarded.*[1] I venture somewhat further, and hesitate not to affirm that, if the manner of it be not perfect, it is at least excellent. It unites in an eminent degree all the advantages the union of which was to be wished for.[2]

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* *Vide* FEDERAL FARMER.—PUBLIUS.

[1] See Ford's "Pamphlets on the Constitution," p. 277.—EDITOR.

[2] Strangely enough this clause has actually proved itself one of the weakest in practice, and has precipitated the most formidable crisis which, short of actual rebellion, has come to our government. Even before its

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It was desirable that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided. This end will be answered by committing the right of making it, not to any pre-established body, but to men chosen by the people for the special purpose, and at the particular conjuncture.

See No. 64.

It was equally desirable that the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice. A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to such complicated investigations.[1]

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defectiveness had been indicated the clause was (after the adoption of the first amendments) the second point in which amendment was suggested. Both in 1797 (Journal of H. of R., ii. 642), and in 1798 (Journal of Senate, ii. 430), motions were made in Congress to modify it. Another series of amendments was offered on November 21, 1800, and on this a committee made an unfavorable report on January 22, 1801. On February 19, 1802, Mitchell of New York introduced resolutions, and Hamilton ("Works," iv. 531) recommended the Federalists to vote for them. Finally, in 1804, the XIIth Amendment was made a part of the constitution, but it only remedied a comparatively minor matter; from that time constant attempts have been made to amend the present clause, and a detailed account of these efforts is given in Johnson's article on "Electors" in Lalor's "Cyclopedia of Political Science."—EDITOR.

[1] No other single miscarriage of the intention of the federal convention equals the failure of the electoral college to make itself an electing, in place of a mere registering, body. The college was successfully deprived of this electoral power through the assumption by the House of Representatives of the right of nominating the presidential candidates,—a power later taken from the latter body by the people, but without restoring to the electors the freedom of choice originally intended. In the first contest all the electors cast their votes for Washington, but how thoroughly they were prepared to use their right of judgment was shown by their votes for Vice President, which were cast for no less than eleven men. In the election of 1792 four candidates for the Vice Presidency received votes, though but two parties existed. The vote of the college was divided in 1796 on thirteen candidates, and in 1800 on five. That the elector still considered his vote free was shown in 1804 by one who wrote to Jefferson offering his vote to the President in return for an office. The

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It was also peculiarly desirable to afford as little opportunity as possible to tumult and disorder. This evil was not least to be dreaded in the election of a magistrate who was to have so important an agency in the administration of the government as the President of the United States. But the precautions which have been so happily concerted in the system under consideration promise an effectual security against this mischief. The choice of *several*, to form an intermediate body of electors, will be much less apt to convulse the community with any extraordinary or violent movements than the choice of *one* who was himself to be the final object of the public wishes. And as the electors, chosen in each State, are to assemble and vote in the State in which they are chosen, this detached and divided situation will expose them much less to heats and ferments, which might be communicated from them to the people, than if they were all to be convened at one time in one place.

Nothing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption. These most deadly adversaries of republican government might naturally have been expected to make their approaches from more than one quarter, but chiefly from the desire in foreign powers to gain an improper ascendant in our councils. How could they better gratify this than by raising a creature of their own to the chief magistracy of the Union? But the convention have guarded against all danger of this sort with the most provident and judicious attention. They have not made

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last sign of independence was in 1872, when the death of Greeley deprived the Democratic electors of the candidate for whom they were bound to vote, and led them to scatter their votes as each elector chose. When, in 1876, it was generally believed that Tilden was elected, though the accepted electoral vote stood as 185 to 184 in favor of Hayes, it was rumored that Mr. James Russell Lowell, who was a republican elector for Massachusetts, intended to prevent fraud by voting for Tilden. But so thoroughly had the principle of the fathers been lost, and so useless a fifth wheel had the college become, that even a man of so much personal and party independence as Mr. Lowell could not finally bring himself to fulfill the very purpose for which as a member of the body he had been chosen.—EDITOR.

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the appointment of the President to depend on any pre-existing bodies of men, who might be tampered with beforehand to prostitute their votes; but they have referred it in the first instance to an immediate act of the people of America, to be exerted in the choice of persons for the temporary and sole purpose of making the appointment. And they have excluded from eligibility to this trust all those who from situation might be suspected of too great devotion to the President in office. No senator, representative, or other person holding a place of trust or profit under the United States, can be of the numbers of the electors. Thus, without corrupting the body of the people, the immediate agents in the election will at least enter upon the task free from any sinister bias. Their transient existence, and their detached situation, already taken notice of, afford a satisfactory prospect of their continuing so to the conclusion of it. The business of corruption, when it is to embrace so considerable a number of men, requires time as well as means. Nor would it be found easy suddenly to embark them, dispersed as they would be over thirteen States, in any combinations founded upon motives which, though they could not properly be denominated corrupt, might yet be of a nature to mislead them from their duty.

Another and no less important desideratum was that the Executive should be independent for his continuance in office on all but the people themselves. He might otherwise be tempted to sacrifice his duty to his complaisance for those whose favor was necessary to the duration of his official consequence. This advantage will also be secured by making his re-election to depend on a special body of representatives, deputed by the society for the single purpose of making the important choice.

All these advantages will happily combine in the plan devised by the convention; which is that the people of each State shall choose a number of persons as electors, equal to the number of senators and representatives of such State in the national government, who shall assemble

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within the State and vote for some fit person as President. Their votes, thus given, are to be transmitted to the seat of the national government, and the person who may happen to have a majority of the whole number of votes will be the President. But as a majority of the votes might not always happen to center in one man, and as it might be unsafe to permit less than a majority to be conclusive, it is provided that, in such a contingency, the House of Representatives shall select out of the candidates who shall have the five highest number of votes, the man who in their opinion may be best qualified for the office.[1]

The process of election affords a moral certainty that the office of President will never fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications. Talents for low intrigue, and the little arts of popularity, may alone suffice to elevate a man to the first honors in a single State; but it will require other talents, and a different kind of merit, to establish him in the esteem and confidence of the whole Union, or of so considerable a portion of it as would be necessary to make him a successful candidate for the distinguished office of President of the United States. It will not be too strong to say that there will be a constant probability of seeing the station filled by characters pre-eminent for ability and virtue. And this will be thought no inconsiderable recommendation of the Constitution, by those who are able to estimate the share which the executive in every government must necessarily have in its good or ill administration. Though we cannot acquiesce in the political heresy[2] of the poet who says:

> "For forms of government let fools contest,—
> That which is best administered is best,"—

yet we may safely pronounce that the true test of a good

[1] A power exercised three times, twice for President (1801 and 1825) and once for Vice President (1837).—EDITOR.

[2] This stanza had just been quoted in a letter of Brutus.—EDITOR.

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government is its aptitude and tendency to produce a good administration.

The Vice President is to be chosen in the same manner with the President; with this difference, that the Senate is to do, in respect to the former, what is to be done by the House of Representatives, in respect to the latter.

The appointment of an extraordinary person as Vice President has been objected to as superfluous, if not mischievous. It has been alleged that it would have been preferable to have authorized the Senate to elect out of their own body an officer answering that description. But two considerations seem to justify the ideas of the convention in this respect. One is that, to secure at all times the possibility of a definite resolution of the body, it is necessary that the President should have only a casting vote. And to take the senator of any State from his seat as senator, to place him in that of President of the Senate, would be to exchange, in regard to the State from which he came, a constant for a contingent vote. The other consideration is that, as the Vice President may occasionally become a substitute for the President in the supreme executive magistracy, all the reasons which recommend the mode of election prescribed for the one apply with great if not with equal force to the manner of appointing the other. It is remarkable that in this, as in most other instances, the objection which is made would lie against the constitution of this State. We have a Lieutenant Governor, chosen by the people at large, who presides in the Senate and is the constitutional substitute for the Governor, in casualties similar to those which would authorize the Vice President to exercise the authorities and discharge the duties of the President. PUBLIUS.

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No. 69 [68]. (*New York Packet*, March 14, 1788.) **Hamilton.**

COMPARISON OF THE PRESIDENT WITH OTHER EXECUTIVES AS TO POWERS.

A single person—Compared with the king of Great Britain and the governor of New York—Elected for four years, and re-eligible—Further comparison with the same executives—Liable to impeachment, removal from office, and punishment by civil law—Compared again as above, and also with governors of Maryland and Delaware—Veto power—Compared again as above, and also with the governor of Massachusetts—Commander-in-chief of the army and navy of the United States—Compared again as above, and also with the governors of New Hampshire and Massachusetts—Pardoning power—Compared as above—Treaty-making power—Compared as above—General review and comparison of executive powers.

To the People of the State of New York:

I proceed now to trace the real characters of the proposed Executive, as they are marked out in the plan of the convention. This will serve to place in a strong light the unfairness of the representations which have been made in regard to it.

The first thing which strikes our attention is that the executive authority, with few exceptions, is to be vested in a single magistrate. This will scarcely, however, be considered as a point upon which any comparison can be grounded; for if, in this particular, there be a resemblance to the king of Great Britain, there is not less a resemblance to the Grand Seignior, to the khan of Tartary, to the Man of the Seven Mountains, or to the governor of New York.

That magistrate is to be elected for *four* years; and is to be re-eligible as often as the people of the United States shall think him worthy of their confidence. In these circumstances there is a total dissimilitude between *him* and a king of Great Britain, who is an *hereditary* monarch, possessing the crown as a patrimony descendible to his heirs forever; but there is a close analogy between *him* and a governor of New York, who is elected for *three* years, and is re-eligible without limitation or

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intermission. If we consider how much less time would be requisite for establishing a dangerous influence in a single State than for establishing a like influence throughout the United States, we must conclude that a duration of *four* years for the Chief Magistrate of the Union is a degree of permanency far less to be dreaded in that office than a duration of *three* years for a corresponding office in a single State.

The President of the United States would be liable to be impeached, tried, and upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law. The person of the king of Great Britain is sacred and inviolable; there is no constitutional tribunal to which he is amenable; no punishment to which he can be subjected without involving the crisis of a national revolution. In this delicate and important circumstance of personal responsibility, the President of Confederated America would stand upon no better ground than a governor of New York, and upon worse ground than the governors of Maryland and Delaware.

The President of the United States is to have power to return a bill, which shall have passed the two branches of the legislature, for reconsideration; and the bill so returned is to become a law, if, upon that reconsideration, it be approved by two-thirds of both houses. See No. 73. The king of Great Britain, on his part, has an absolute negative upon the acts of the two houses of Parliament. The disuse of that power for a considerable time past does not affect the reality of its existence, and is to be ascribed wholly to the crown's having found the means of substituting influence to authority, or the art of gaining a majority in one or the other of the two houses to the necessity of exerting a prerogative which could seldom be exerted without hazarding some degree of national agitation.[1] The qualified negative of the

[1] According to Mr. Bryce, the last instance "of the use of the 'veto power' in England was by Queen Anne in 1707 on a Scotch militia bill."

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President differs widely from this absolute negative of the British sovereign, and tallies exactly with the revisionary authority of the council of revision of this State, of which the governor is a constituent part. In this respect the power of the President would exceed that of the governor of New York, because the former would possess singly what the latter shares with the chancellor and judges; but it would be precisely the same with that of the governor of Massachusetts, whose constitution as to this article seems to have been the original from which the convention have copied.

The President is to be the "commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States. He is to have power to grant reprieves and pardons for offenses against the United States, *except in cases of impeachment;* to recommend to the consideration of Congress such measures as he shall judge necessary and expedient; to convene, on extraordinary occasions, both houses of the legislature, or either of them, and, in case of disagreement between them *with respect to the time of adjournment*, to adjourn them to such time as he shall think proper; to take care that the laws be faithfully executed; and to commission all officers of the United States." In most of these particulars the power of the President will resemble equally that of the king of Great Britain and of the governor of New York. The most material points of difference are these: *First.* The President will have only the occasional command of such part of the militia of the nation as by legislative provision may be called into the actual service of the Union. The king of Great Britain and the governor of New York have at all times the entire command of all the militia within their several jurisdictions. In this article, therefore, the power of the President

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In Todd's "Parliamentary Government in England" the author says that in 1858 changes in a private railway bill were compelled by an intimation to its promoters that, if these changes were not made, the royal power of rejection would be exercised.—EDITOR.

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would be inferior to that of either the monarch or the governor. *Secondly.* The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies; all of which, by the Constitution under consideration, would appertain to the legislature.* The governor of New York, on the other hand, is by the constitution of the State vested only with the command of its militia and navy. But the constitutions of several of the States expressly declare their governors to be commanders-in-chief as well of the army as navy; and it may well be a question, whether those of New Hampshire and Massachusetts, in particular, do not, in this instance, confer larger powers upon their respective governors than could be claimed by a President of the United States. *Thirdly.* The power of the President in respect to pardons would extend to all cases *except those of impeachment.* The governor of New York may pardon in all cases, even in those of impeachment, except for treason and murder. Is not the power of the governor in this article, on a calculation of political consequences, greater than that of the President? All conspiracies and plots against the government which have not been

* A writer in a Pennsylvania paper, under the signature of TAMONY, has asserted that the king of Great Britain owes his prerogative as commander-in-chief to an annual mutiny bill. The truth is, on the contrary, that his prerogative, in this respect, is immemorial, and was only disputed, "contrary to all reason and precedent," as Blackstone, vol. i. p. 262, expresses it, by the Long Parliament of Charles I.; but by the statute the 13th of Charles II., chap. 6, it was declared to be in the king alone, for that the sole supreme government and command of the militia within his Majesty's realms and dominions, and of all forces by sea and land, and of all forts and places of strength, EVER WAS AND IS the undoubted right of his Majesty and his royal predecessors, kings and queens of England, and that both or either house of Parliament cannot nor ought to pretend to the same.—PUBLIUS.

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matured into actual treason may be screened from punishment of every kind, by the interposition of the prerogative of pardoning. If a governor of New York, therefore, should be at the head of any such conspiracy, until the design had been ripened into actual hostility he could insure his accomplices and adherents an entire impunity. A President of the Union, on the other hand, though he may even pardon treason when prosecuted in the ordinary course of law, could shelter no offender in any degree from the effects of impeachment and conviction. Would not the prospect of a total indemnity for all the preliminary steps be a greater temptation to undertake and persevere in an enterprise against the public liberty than the mere prospect of an exemption from death and confiscation, if the final execution of the design, upon an actual appeal to arms, should miscarry? Would this last expectation have any influence at all, when the probability was computed that the person who was to afford that exemption might himself be involved in the consequences of the measure and might be incapacitated by his agency in it from affording the desired impunity? The better to judge of this matter, it will be necessary to recollect that by the proposed Constitution the offense of treason is limited "to levying war upon the United States, and adhering to their enemies, giving them aid and comfort," and that by the laws of New York it is confined within similar bounds. *Fourthly.* The President can only adjourn the national legislature in the single case of disagreement about the time of adjournment. The British monarch may prorogue or even dissolve the Parliament. The governor of New York may also prorogue the legislature of this State for a limited time; a power which, in certain situations, may be employed to very important purposes.

The President is to have power, with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur. The king of Great Britain is the sole and absolute representative of the nation in all foreign transactions.

See No. 68.

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He can of his own accord make treaties of peace, commerce, alliance, and of every other description. It has been insinuated that his authority in this respect is not conclusive and that his conventions with foreign powers are subject to the revision, and stand in need of the ratification of Parliament. But I believe this doctrine was never heard of until it was broached upon the present occasion. Every jurist * of that kingdom, and every other man acquainted with its Constitution, knows as an established fact that the prerogative of making treaties exists in the crown in its utmost plentitude; and that the compacts entered into by the royal authority have the most complete legal validity and perfection, independent of any other sanction.[1] The Parliament, it is true, is sometimes seen employing itself in altering the existing laws to conform them to the stipulations in a new treaty; and this may have possibly given birth to the imagination that its co-operation was necessary to the obligatory efficacy of the treaty. But this parliamentary interposition proceeds from a different cause: from the necessity of adjusting a most artificial and intricate system of rev-

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* *Vide* Blackstone's "Commentaries," vol. i. p. 257.—PUBLIUS.

[1] "Recent discussions have also brought into curious prominence another part of the constitution. I said in this book that it would very much surprise people if they were only told how many things the queen could do without consulting Parliament, and it certainly has so proved; for when the queen abolished purchase in the army by an act of prerogative (after the Lords had rejected the bill for doing so), there was a great and general astonishment. But this is nothing to what the queen can by law do without consulting Parliament. Not to mention other things, she could disband the army (by law she cannot engage more than a certain number of men, but she is not obliged to engage any men); she could dismiss all the officers, from the general-commanding-in-chief downward; she could dismiss all the sailors, too; she could sell off all our ships-of-war and all our naval stores; she could make a peace by the sacrifice of Cornwall, and begin a war for the conquest of Brittany. She could make every citizen in the United Kingdom, male or female, a peer; she could make every parish in the United Kingdom a 'university'; she could dismiss most of the civil servants; she could pardon all offenders. In a word, the queen could by prerogative upset all the action of civil government within the government, could disgrace the nation by a bad war or peace, and could, by disbanding our forces, whether land or sea, leave us defenseless against foreign nations."—Bagehot's "English Constitution."—EDITOR.

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enue and commercial laws to the changes made in them by the operation of the treaty, and of adapting new provisions and precautions to the new state of things, to keep the machine from running into disorder. In this respect, therefore, there is no comparison between the intended power of the President and the actual power of the British sovereign. The one can perform alone what the other can do only with the concurrence of a branch of the legislature. It must be admitted that in this instance the power of the federal Executive would exceed that of any State Executive. But this arises naturally from the sovereign power which relates to treaties. If the Confederacy were to be dissolved, it would become a question whether the Executives of the several States were not solely invested with that delicate and important prerogative.

The President is also to be authorized to receive ambassadors and other public ministers. This, though it has been a rich theme of declamation, is more a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of the government; and it was far more convenient that it should be arranged in this manner than that there should be a necessity of convening the legislature, or one of its branches, upon every arrival of a foreign minister, though it were merely to take the place of a departed predecessor.

The President is to nominate and, *with the advice and consent of the Senate*, to appoint ambassadors and other public ministers, judges of the Supreme Court, and in general all officers of the United States established by law, and whose appointments are not otherwise provided for by the Constitution. The king of Great Britain is emphatically and truly styled the fountain of honor. He not only appoints to all offices, but can create offices. He can confer titles of nobility at pleasure, and has the disposal of an immense number of church preferments. There is evidently a great inferiority in the power of the President, in this particular, to that of the British king;

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nor is it equal to that of the governor of New York, if we are to interpret the meaning of the constitution of the State by the practice which has obtained under it. The power of appointment is with us lodged in a council composed of the governor and four members of the Senate, chosen by the Assembly. The governor *claims*, and has frequently *exercised*, the right of nomination, and is *entitled* to a casting vote in the appointment.[1] If he really has the right of nominating, his authority is in this respect equal to that of the President, and exceeds it in the article of the casting vote. In the national government, if the Senate should be divided, no appointment could be made; in the government of New York, if the council should be divided, the governor can turn the scale, and confirm his own nomination.* If we compare the publicity which must necessarily attend the mode of appointment by the President and an entire branch of the national legislature with the privacy in the mode of appointment by the governor of New York, closeted in a secret apartment with at most four, and frequently with only two persons; and if we at the same time consider how much more easy it must be to influence the small number of which a council of appointment consists than the considerable number of which the national Senate would consist, we cannot hesitate to pronounce that the power of the chief magistrate of this State, in the disposition of offices, must in practice be greatly superior to that of the Chief Magistrate of the Union.

Hence it appears that, except as to the concurrent authority of the President in the article of treaties, it

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*Candor, however, demands an acknowledgment that I do not think the claim of the governor to a right of nomination well founded. Yet it is always justifiable to reason from the practice of a government, till its propriety has been constitutionally questioned. And independent of this claim, when we take into view the other considerations, and pursue them through all their consequences, we shall be inclined to draw much the same conclusion.—PUBLIUS.

[1] A full history of the New York system of appointments will be found in Street's "Council of Revision of the State of New York."—EDITOR.

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would be difficult to determine whether that magistrate would, in the aggregate, possess more or less power than the governor of New York. And it appears, yet more unequivocally, that there is no pretense for the parallel which has been attempted between him and the king of Great Britain. But to render the contrast in this respect still more striking, it may be of use to throw the principal circumstances of dissimilitude into a closer group.

The President of the United States would be an officer elected by the people for *four* years; the king of Great Britain is a perpetual and *hereditary* prince. The one would be amenable to personal punishment and disgrace; the person of the other is sacred and inviolable. The one would have a *qualified* negative upon the acts of the legislative body; the other has an *absolute* negative. The one would have a right to command the military and naval forces of the nation; the other, in addition to this right, possesses that of *declaring* war and of *raising* and *regulating* fleets and armies by his own authority. The one would have a concurrent power with a branch of the legislature in the formation of treaties; the other is the *sole possessor* of the power of making treaties. The one would have a like concurrent authority in appointing to offices; the other is the sole author of all appointments. The one can confer no privileges whatever; the other can make denizens of aliens, noblemen of commoners; can erect corporations with all the rights incident to corporate bodies. The one can prescribe no rules concerning the commerce or currency of the nations; the other is in several respects the arbiter of commerce, and in this capacity can establish markets and fairs, can regulate weights and measures, can lay embargoes for a limited time, can coin money, can authorize or prohibit the circulation of foreign coin. The one has no particle of spiritual jurisdiction; the other is the supreme head and governor of the national church! What answer shall we give to those who would persuade us that things so unlike resemble each other? The same

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that ought to be given to those who tell us that a government, the whole power of which would be in the hands of the elective and periodical servants of the people, is an aristocracy, a monarchy, and a despotism.

PUBLIUS.

No. 70 [69]. (*Independent Journal*, March 15, 1788.) Hamilton.

ADVANTAGE OF A SINGLE EXECUTIVE.

A vigorous Executive consistent with republican government—What constitutes a proper Executive—Unity—Reasons for this—Vesting executive authority in two or more magistrates—Restraining the Executive by council—Objections to plurality and control by council enumerated.

To the People of the State of New York:

There is an idea, which is not without its advocates, that a vigorous Executive is inconsistent with the genius of republican government. The enlightened well-wishers to this species of government must at least hope that the supposition is destitute of foundation; since they can never admit its truth, without at the same time admitting the condemnation of their own principles. Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. Every man the least conversant in Roman story knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of Dictator, as well against the intrigues of ambitious individuals who aspired to the tyranny and the seditions of whole classes of the community whose conduct threatened the existence of all

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government, as against the invasions of external enemies who menaced the conquest and destruction of Rome.

There can be no need, however, to multiply arguments or examples on this head. A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be in practice a bad government.

Taking it for granted, therefore, that all men of sense will agree in the necessity of an energetic Executive, it will only remain to inquire, What are the ingredients which constitute this energy? How far can they be combined with those other ingredients which constitute safety, in the republican sense? And how far does this combination characterize the plan which has been reported by the convention?

The ingredients which constitute energy in the Executive are, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers.

The ingredients which constitute safety in the republican sense are, first, a due dependence on the people; secondly, a due responsibility.

Those politicians and statesmen who have been the most celebrated for the soundness of their principles and for the justice of their views have declared in favor of a single Executive and a numerous legislature. They have, with great propriety, considered energy as the most necessary qualification of the former, and have regarded this as most applicable to power in a single hand; while they have, with equal propriety, considered the latter as best adapted to deliberation and wisdom, and best calculated to conciliate the confidence of the people and to secure their privileges and interests.

That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater

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number; and in proportion as the number is increased these qualities will be diminished.

This unity may be destroyed in two ways: either by vesting the power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject, in whole or in part, to the control and co-operation of others, in the capacity of counselors to him. Of the first, the two Consuls of Rome may serve as an example; of the last, we shall find examples in the constitutions of several of the States. New York and New Jersey, if I recollect right, are the only States which have intrusted the executive authority wholly to single men.* Both these methods of destroying the unity of the Executive have their partisans; but the votaries of an executive council are the most numerous. They are both liable, if not to equal, to similar objections, and may in most lights be examined in conjunction.

The experience of other nations will afford little instruction on this head. As far, however, as it teaches anything, it teaches us not to be enamored of plurality in the Executive. We have seen that the Achæans, on an experiment of two Prætors, were induced to abolish one. The Roman history records many instances of mischiefs to the republic from the dissensions between the Consuls, and between the military Tribunes who were at times substituted for the Consuls. But it gives us no specimens of any peculiar advantages derived to the State from the circumstance of the plurality of those magistrates. That the dissensions between them were not more frequent or more fatal is matter of astonishment, until we advert to the singular position in which the republic was almost continually placed, and to the prudent policy pointed out by the circumstances of the State, and pursued by the Consuls, of making a division of the government between them. The patricians engaged in a perpetual struggle with the plebeians for the preservation of their ancient authorities and dignities; the Consuls, who were generally chosen out of the former body, were commonly united by the personal interest they had in the defense of the privileges of their order. In addition to this motive of union,

* New York has no council except for the single purpose of appointing to offices; New Jersey has a council whom the governor may consult. But I think, from the terms of the constitution, their resolutions do not bind him.—PUBLIUS.

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after the arms of the republic had considerably expanded the bounds of its empire, it became an established custom with the Consuls to divide the administration between themselves by lot—one of them remaining at Rome to govern the city and its environs, the other taking the command in the more distant provinces. This expedient must, no doubt, have had great influence in preventing those collisions and rivalships which might otherwise have embroiled the peace of the republic.

But quitting the dim light of historical research, attaching ourselves purely to the dictates of reason and good sense, we shall discover much greater cause to reject than to approve the idea of plurality in the Executive, under any modification whatever.

Wherever two or more persons are engaged in any common enterprise or pursuit, there is always danger of difference of opinion. If it be a public trust or office, in which they are clothed with equal dignity and authority, there is peculiar danger of personal emulation and even animosity. From either, and especially from all these causes, the most bitter dissensions are apt to spring. Whenever these happen they lessen the respectability, weaken the authority, and distract the plans and operation of those whom they divide. If they should unfortunately assail the supreme executive magistracy of a country, consisting of a plurality of persons, they might impede or frustrate the most important measures of the government, in the most critical emergencies of the State. And what is still worse, they might split the community into the most violent and irreconcilable factions, adhering differently to the different individuals who composed the magistracy.[1]

Men often oppose a thing merely because they have had no agency in planning it, or because it may have been planned by those whom they dislike. But if they have

[1] The framers had had a recent object lesson of a plural executive in a so-called "Committee of states," one of Jefferson's projects, which consisted of one delegate from each state, to sit between the sessions of the Continental Congress and manage certain of its affairs. An account of this committee is in Jefferson's "Writings" (i. 76), where a similar experience in the French plural executive is also noticed. Perhaps the most striking modern instance of its evils is to be seen in the so-called bipartisan boards of our local politics.—EDITOR.

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been consulted and have happened to disapprove, opposition then becomes, in their estimation, an indispensable duty of self-love. They seem to think themselves bound in honor, and by all the motives of personal infallibility, to defeat the success of what has been resolved upon contrary to their sentiments. Men of upright, benevolent tempers have too many opportunities of remarking with horror to what desperate lengths this disposition is sometimes carried, and how often the great interests of society are sacrificed to the vanity, to the conceit, and to the obstinacy of individuals, who have credit enough to make their passions and their caprices interesting to mankind. Perhaps the question now before the public may, in its consequences, afford melancholy proofs of the effects of this despicable frailty, or rather detestable vice, in the human character.

Upon the principles of a free government, inconveniences from the source just mentioned must necessarily be submitted to in the formation of the legislature; but it is unnecessary, and therefore unwise, to introduce them into the constitution of the Executive. It is here, too, that they may be most pernicious. In the legislature promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarrings of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection and serve to check excesses in the majority. When a resolution, too, is once taken, the opposition must be at an end. That resolution is a law, and resistance to it punishable. But no favorable circumstances palliate or atone for the disadvantages of dissension in the executive department. Here they are pure and unmixed. There is no point at which they cease to operate. They serve to embarrass and weaken the execution of the plan or measure to which they relate, from the first step to the final conclusion of it. They constantly counteract those qualities in the Executive which are the most necessary ingredients in its composition,—vigor and expedition,—and this with-

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out any counterbalancing good. In the conduct of war, in which the energy of the Executive is the bulwark of the national security, everything would be to be apprehended from its plurality.

It must be confessed that these observations apply with principal weight to the first case supposed—that is, to a plurality of magistrates of equal dignity and authority; a scheme, the advocates for which are not likely to form a numerous sect; but they apply, though not with equal, yet with considerable weight to the project of a council whose concurrence is made constitutionally necessary to the operations of the ostensible Executive. An artful cabal in that council would be able to distract and to enervate the whole system of administration. If no such cabal should exist, the mere diversity of views and opinions would alone be sufficient to tincture the exercise of the executive authority with a spirit of habitual feebleness and dilatoriness.

But one of the weightiest objections to a plurality in the Executive, and which lies as much against the last as the first plan, is that it tends to conceal faults and destroy responsibility. Responsibility is of two kinds—to censure and to punishment. The first is the more important of the two, especially in an elective office. Man, in public trust, will much oftener act in such a manner as to render him unworthy of being any longer trusted than in such a manner as to make him obnoxious to legal punishment. But the multiplication of the Executive adds to the difficulty of detection in either case. It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall. It is shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author. The circumstances which may have led to any national miscarriage or misfortune are sometimes so complicated that, where there are a number of actors who may have had different degrees and kinds of agency,

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though we may clearly see upon the whole that there has been mismanagement, yet it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable.

"I was overruled by my council. The council were so divided in their opinions that it was impossible to obtain any better resolution on the point." These and similar pretexts are constantly at hand, whether true or false. And who is there that will either take the trouble, or incur the odium, of a strict scrutiny into the secret springs of the transaction? Should there be found a citizen zealous enough to undertake the unpromising task, if there happen to be collusion between the parties concerned, how easy it is to clothe the circumstances with so much ambiguity as to render it uncertain what was the precise conduct of any of those parties!

In the single instance in which the governor of this State is coupled with a council—that is, in the appointment to offices—we have seen the mischiefs of it in the view now under consideration. Scandalous appointments to important offices have been made. Some cases, indeed, have been so flagrant that ALL PARTIES have agreed in the impropriety of the thing. When inquiry has been made the blame has been laid by the governor on the members of the council, who on their part have charged it upon his nomination; while the people remain altogether at a loss to determine by whose influence their interests have been committed to hands so unqualified and so manifestly improper. In tenderness to individuals, I forbear to descend to particulars.

See Nos. 69 and 74.

It is evident from these considerations that the plurality of the Executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power: *first*, the restraints of public opinion, which lose their efficacy, as well on account of the division of the censure attendant on bad measures among a number as on account of the uncertainty on whom it ought to fall; and, *secondly*, the oppor-

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tunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office or to their actual punishment in cases which admit of it.

In England the king is a perpetual magistrate; and it is a maxim which has obtained for the sake of the public peace, that he is unaccountable for his administration, and his person sacred. Nothing, therefore, can be wiser in that kingdom than to annex to the king a constitutional council who may be responsible to the nation for the advice they give. Without this, there would be no responsibility whatever in the executive department—an idea inadmissible in a free government. But even there the king is not bound by the resolutions of his council, though they are answerable for the advice they give. He is the absolute master of his own conduct in the exercise of his office, and may observe or disregard the council given to him at his sole discretion.

But in a republic, where every magistrate ought to be personally responsible for his behavior in office, the reason which in the British Constitution dictates the propriety of a council not only ceases to apply, but turns against the institution. In the monarchy of Great Britain it furnishes a substitute for the prohibited responsibility of the chief magistrate, which serves in some degree as a hostage to the national justice for his good behavior. In the American republic it would serve to destroy, or would greatly diminish, the intended and necessary responsibility of the Chief Magistrate himself.

The idea of a council to the Executive,[1] which has so generally obtained in the State constitutions, has been derived from that maxim of republican jealousy which considers power as safer in the hands of a number of men than of a single man. If the maxim should be admitted to be applicable to the case, I should contend that the advantage on that side would not counterbalance the numerous disadvantages on the opposite side. But I do not think the rule at all applicable to the executive power.

[1] The same result, so far as all its advantages go, without the disadvantage of loss of individual responsibility, has been attained by the presidential cabinet, now a recognized if extra-constitutional part of our government. Washington, who instituted it, tried to make the Vice President a member as well. From the dissensions in the cabinets of Washington, John Adams, and Jackson, the result of a council independent of the President can be inferred.—EDITOR.

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I clearly concur in opinion, in this particular, with a writer whom the celebrated Junius pronounces to be "deep, solid, and ingenious," that "the executive power is more easily confined when it is ONE";* that it is far more safe there should be a single object for the jealousy and watchfulness of the people; and, in a word, that all multiplication of the Executive is rather dangerous than friendly to liberty.

A little consideration will satisfy us that the species of security sought for in the multiplication of the Executive is unattainable. Numbers must be so great as to render combination difficult, or they are rather a source of danger than of security. The united credit and influence of several individuals must be more formidable to liberty than the credit and influence of either of them separately. When power, therefore, is placed in the hands of so small a number of men as to admit of their interests and views being easily combined in a common enterprise by an artful leader, it becomes more liable to abuse, and more dangerous when abused, than if it be lodged in the hands of one man; who, from the very circumstance of his being alone, will be more narrowly watched and more readily suspected, and who cannot unite so great a mass of influence as when he is associated with others. The Decemvirs of Rome, whose name denotes their number,† were more to be dreaded in their usurpation than any ONE of them would have been. No person would think of proposing an Executive much more numerous than that body; from six to a dozen have been suggested for the number of the council. The extreme of these numbers is not too great for an easy combination; and from such a combination America would have more to fear than from the ambition of any single individual. A council to a magistrate who is himself responsible for what he does are generally nothing better than a clog upon his good intentions, are often the instruments and accomplices of his bad, and are almost always a cloak to his faults.

* De Lolme.—PUBLIUS.

† Ten.—PUBLIUS.

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I forbear to dwell upon the subject of expense; though it be evident that if the council should be numerous enough to answer the principal end aimed at by the institution, the salaries of the members, who must be drawn from their homes to reside at the seat of government, would form an item in the catalogue of public expenditures too serious to be incurred for an object of equivocal utility. I will only add that, prior to the appearance of the Constitution, I rarely met with an intelligent man from any of the States who did not admit, as the result of experience, that the UNITY of the executive of this State was one of the best of the distinguishing features of our constitution.

PUBLIUS.

No. 71 [70]. (*New York Packet*, March 18, 1788.) Hamilton.

THE PRESIDENTIAL TERM OF OFFICE.

It affects firmness in action—More interest in what is permanent—The Executive should not be subservient to popular impulses or to those of the legislature—Independence of departments of government necessary—Shortness of term will lessen independence—The proposed term of four years considered.

To the People of the State of New York:

Duration in office has been mentioned as the second requisite to the energy of the executive authority. This has relation to two objects: to the personal firmness of the Executive Magistrate in the employment of his constitutional powers; and to the stability of the system of administration which may have been adopted under his auspices. With regard to the first, it must be evident that, the longer the duration in office, the greater will be the probability of obtaining so important an advantage. It is a general principle of human nature that a man will be interested in whatever he possesses, in proportion to the firmness or precariousness of the tenure by which he holds it; will be less attached to what he holds by a momentary or uncertain title than to

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what he enjoys by a durable or certain title; and, of course, will be willing to risk more for the sake of the one than for the sake of the other. This remark is not less applicable to a political privilege, or honor, or trust than to any article of ordinary property. The inference from it is that a man acting in the capacity of chief magistrate, under a consciousness that in a very short time he *must* lay down his office, will be apt to feel himself too little interested in it to hazard any material censure or perplexity from the independent exertion of his powers, or from encountering the ill-humors, however transient, which may happen to prevail, either in a considerable part of the society itself or even in a predominant faction in the legislative body. If the case should only be that he *might* lay it down, unless continued by a new choice, and if he should be desirous of being continued, his wishes, conspiring with his fears, would tend still more powerfully to corrupt his integrity or debase his fortitude. In either case, feebleness and irresolution must be the characteristics of the station.

There are some who would be inclined to regard the servile pliancy of the Executive to a prevailing current, either in the community or in the legislature, as its best recommendation. But such men entertain very crude notions, as well of the purposes for which government was instituted, as of the true means by which the public happiness may be promoted. The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they intrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men who flatter their prejudices to betray their interests. It is a just observation that the people commonly *intend* the PUBLIC GOOD. This often applies to their very errors. But their good sense would despise the adulator who should pretend that they always *reason right* about the *means* of promoting it. They know from experience that they sometimes err;

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and the wonder is that they so seldom err as they do, beset, as they continually are, by the wiles of parasites and sycophants, by the snares of the ambitious, the avaricious, the desperate; by the artifices of men who possess their confidence more than they deserve it, and of those who seek to possess rather than to deserve it. When occasions present themselves in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection. Instances might be cited in which a conduct of this kind has saved the people from very fatal consequences of their own mistakes, and has procured lasting monuments of their gratitude to the men who had courage and magnanimity enough to serve them at the peril of their displeasure.

But however inclined we might be to insist upon an unbounded complaisance in the Executive to the inclinations of the people, we can with no propriety contend for a like complaisance to the humors of the legislature. The latter may sometimes stand in opposition to the former, and at other times the people may be entirely neutral. In either supposition, it is certainly desirable that the Executive should be in a situation to dare to act his own opinion with vigor and decision.

The same rule which teaches the propriety of a partition between the various branches of power teaches us likewise that this partition ought to be so contrived as to render the one independent of the other. To what purpose separate the executive or the judiciary from the legislative, if both the executive and the judiciary are so constituted as to be at the absolute devotion of the legislative? Such a separation must be merely nominal and incapable of producing the ends for which it was established. It is one thing to be subordinate to the laws, and another to be dependent on the legislative body. The first comports with, the last violates, the fundamen-

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tal principles of good government; and, whatever may be the forms of the Constitution, unites all power in the same hands. The tendency of the legislative authority to absorb every other has been fully displayed and illustrated by examples in some preceding numbers. In governments purely republican, this tendency is almost irresistible. The representatives of the people in a popular assembly seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter; as if the exercise of its rights, by either the executive or judiciary, were a breach of their privilege and an outrage to their dignity. They often appear disposed to exert an imperious control over the other departments; and as they commonly have the people on their side, they always act with such momentum as to make it very difficult for the other members of the government to maintain the balance of the Constitution.

See No. 47.

It may perhaps be asked how the shortness of the duration in office can affect the independence of the Executive on the legislature, unless the one were possessed of the power of appointing or displacing the other. One answer to this inquiry may be drawn from the principle already remarked—that is, from the slender interest a man is apt to take in a short-lived advantage, and the little inducement it affords him to expose himself, on account of it, to any considerable inconvenience or hazard. Another answer, perhaps more obvious, though not more conclusive, will result from the consideration of the influence of the legislative body over the people; which might be employed to prevent the re-election of a man who, by an upright resistance to any sinister project of that body, should have made himself obnoxious to its resentment.

It may be asked also whether a duration of four years would answer the end proposed; and if it would not, whether a less period, which would at least be recommended by greater security against ambitious designs,

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would not for that reason be preferable to a longer period, which was, at the same time, too short for the purpose of inspiring the desired firmness and independence of the magistrate.

It cannot be affirmed that a duration of four years, or any other limited duration, would completely answer the end proposed; but it would contribute towards it in a degree which would have a material influence upon the spirit and character of the government. Between the commencement and termination of such a period there would always be a considerable interval in which the prospect of annihilation would be sufficiently remote not to have an improper effect upon the conduct of a man indued with a tolerable portion of fortitude; and in which he might reasonably promise himself that there would be time enough before it arrived to make the community sensible of the propriety of the measures he might incline to pursue. Though it be probable that, as he approached the moment when the public were by a new election to signify their sense of his conduct, his confidence, and with it his firmness, would decline; yet both the one and the other would derive support from the opportunities which his previous continuance in the station had afforded him of establishing himself in the esteem and good will of his constituents. He might then hazard with safety, in proportion to the proofs he had given of his wisdom and integrity and to the title he had acquired to the respect and attachment of his fellow-citizens. As, on the one hand, a duration of four years will contribute to the firmness of the Executive in a sufficient degree to render it a very valuable ingredient in the composition, so, on the other, it is not enough to justify any alarm for the public liberty.[1] If a British

[1] This question of stability has already been discussed in a note to No. 37. Bagehot blames the American government, and especially the presidency, because "there is no elastic element; everything is rigid, specified, dated," and he cites as an advantage of the English system the power by which a new government can be promptly substituted, instancing the turning out of the Aberdeen cabinet during the Crimean difficulties, when, "as was said at the time, 'we turn out the quaker and put in the

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House of Commons from the most feeble beginnings, *from the mere power of assenting or disagreeing to the imposition of a new tax*, have by rapid strides reduced the prerogatives of the crown and the privileges of the nobility within the limits they conceived to be compatible with the principles of a free government, while they raised themselves to the rank and consequence of a coequal branch of the legislature; if they have been able, in one instance, to abolish both the royalty and the aristocracy and to overturn all the ancient establishments, as well in the Church as State; if they have been able, on a recent occasion, to make the monarch tremble at the prospect of an innovation * attempted by them, what would be to be feared from an elective magistrate of four years' duration, with the confined authorities of a President of the United States? What but that he might be unequal to the task which the Constitution assigns him? I shall only add that, if his duration be such as to leave a doubt of his firmness, that doubt is inconsistent with a jealousy of his encroachments.—PUBLIUS.

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pugilist.'" It may be granted that the English method is more elastic, in that it permits the transference of power to a set of men better fitted to deal with a peculiar condition; and it would have been an advantage to the United States to be able to substitute for such Presidents as Madison and Buchanan men better fitted for emergencies. A fairly close approximation to such a flexible method is, however, obtained by making the Secretary of War the actually responsible official, and then by substituting another for him if he fails, as was done twice in the War of 1812 and once in the Civil War. The real difficulty, certain to be experienced by such constitutional governments as Great Britain and the United States, is to find a man bred in political life, who possesses at the same time the peculiarly unpolitical faculties which are needed in conducting a war. Should either country be called upon at present to select an official to carry on a great war, the appointment of an able man would be very much of a lottery.—EDITOR.

* This was the case with respect to Mr. Fox's India bill, which was carried in the House of Commons and rejected in the House of Lords, to the entire satisfaction, as it is said, of the people.—PUBLIUS.

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No. 72 [71]. (*Independent Journal*, March 19, 1788.) Hamilton.

RE-ELIGIBILITY OF THE PRESIDENT.

Duration in office affects stability of administration—Heads of departments dependent on Executive and will change with him—Re-eligibility of Executive—The opposition to it considered—A limit of a single term would diminish inducements to good behavior, increase temptations to misconduct, prevent experience in the office, deprive the country in emergencies of the services of the best men, and act as a constitutional barrier to stability of administration—The supposed advantages of a single term considered—The people should not be prevented from choosing men of experience.

To the People of the State of New York:

The administration of government, in its largest sense, comprehends all the operations of the body politic, whether legislative, executive, or judiciary; but in its most usual and perhaps in its most precise signification, it is limited to executive details, and falls peculiarly within the province of the executive department. The actual conduct of foreign negotiations, the preparatory plans of finance, the application and disbursement of the public moneys in conformity to the general appropriations of the legislature, the arrangement of the army and navy, the direction of the operations of war—these, and other matters of a like nature, constitute what seems to be most properly understood by the administration of government. The persons, therefore, to whose immediate management these different matters are committed, ought to be considered as the assistants or deputies of the Chief Magistrate, and on this account they ought to derive their offices from his appointment, at least from his nomination, and ought to be subject to his superintendence. This view of the subject will at once suggest to us the intimate connection between the duration of the executive magistrate in office and the stability of the system of administration. To reverse and undo what has been done by a predecessor is very often considered by a successor as the best proof he can give

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of his own capacity and desert; and in addition to this propensity, where the alteration has been the result of public choice, the person substituted is warranted in supposing that the dismission of his predecessor has proceeded from a dislike to his measures; and that the less he resembles him, the more he will recommend himself to the favor of his constituents. These considerations, and the influence of personal confidences and attachments, would be likely to induce every new President to promote a change of men to fill the subordinate stations; and these causes together could not fail to occasion a disgraceful and ruinous mutability in the administration of the government.

With a positive duration of considerable extent, I connect the circumstance of re-eligibility.[1] The first is necessary to give to the officer himself the inclination and the resolution to act his part well, and to the community time and leisure to observe the tendency of his

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[1] This re-eligibility was a theory of the framers, based on the idea that so long as it was possible for a man to be re-elected to the presidency, he would strive by good conduct to win it, while, if he was constitutionally barred, he would probably overturn the constitution by force; this latter result has repeatedly occurred in the South American republics. In the constitution of the Confederate States the term was fixed at six years and a second term was forbidden, though no reason was given for the change.

In practice there has come to be an unwritten understanding that no President shall be re-elected more than once; and this has been attained, not by the popular will, but entirely by the voluntary action of the Presidents themselves. Washington retired at the end of two terms; but those by whom he was most swayed were urging him, just before he died, once more to offer himself for the position; and though he declined, he acknowledged that the motive of "great public good" would overcome his refusal. Jefferson imitated him, hoping "that a few more Presidents will oppose the obstacle of habit [and . . .] beget a disposition to establish it by an amendment of the constitution" ("Writings," viii. 339). He distinctly outlined a possibility, however, which would induce him to accept a third term, but how little the people cared about the matter is shown by the fact that more than a majority of the state legislatures voted resolutions asking him to serve a third term. Both Madison and Monroe refused to take a third nomination, and thus the principle became so established that, though President Grant was unquestionably willing to stand for a third term, the opposition within his own party, and the strength of the non-partisan protests, were sufficient to prevent his securing even the nomination.—EDITOR.

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measures, and thence to form an experimental estimate of their merits. The last is necessary to enable the people, when they see reason to approve of his conduct, to continue him in his station, in order to prolong the utility of his talents and virtues, and to secure to the government the advantage of permanency in a wise system of administration.

Nothing appears more plausible at first sight, nor more ill-founded upon close inspection, than a scheme which in relation to the present point has had some respectable advocates—I mean that of continuing the chief magistrate in office for a certain time, and then excluding him from it, either for a limited period or forever after. This exclusion, whether temporary or perpetual, would have nearly the same effects, and these effects would be for the most part rather pernicious than salutary.

One ill effect of the exclusion would be a diminution of the inducements to good behavior. There are few men who would not feel much less zeal in the discharge of a duty when they were conscious that the advantages of the station with which it was connected must be relinquished at a determinate period, than when they were permitted to entertain a hope of *obtaining* by *meriting* a continuance of them. This position will not be disputed so long as it is admitted that the desire of reward is one of the strongest incentives of human conduct; or that the best security for the fidelity of mankind is to make their interest coincide with their duty. Even the love of fame, the ruling passion of the noblest minds, which would prompt a man to plan and undertake extensive and arduous enterprises for the public benefit, requiring considerable time to mature and perfect them, if he could flatter himself with the prospect of being allowed to finish what he had begun, would, on the contrary, deter him from the undertaking, when he foresaw that he must quit the scene before he could accomplish the work, and must commit that, together with his own reputation, to hands which might be unequal or unfriendly to the task. The most to be expected from

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the generality of men, in such a situation, is the negative merit of not doing harm, instead of the positive merit of doing good.

Another ill effect of the exclusion would be the temptation to sordid views, to peculation, and, in some instances, to usurpation. An avaricious man, who might happen to fill the office, looking forward to a time when he must at all events yield up the emoluments he enjoyed, would feel a propensity, not easy to be resisted by such a man, to make the best use of the opportunity he enjoyed while it lasted, and might not scruple to have recourse to the most corrupt expedients to make the harvest as abundant as it was transitory; though the same man, probably, with a different prospect before him, might content himself with the regular perquisites of his situation, and might even be unwilling to risk the consequences of an abuse of his opportunities. His avarice might be a guard upon his avarice. Add to this that the same man might be vain or ambitious, as well as avaricious. And if he could expect to prolong his honors by his good conduct, he might hesitate to sacrifice his appetite for them to his appetite for gain. But with the prospect before him of approaching an inevitable annihilation, his avarice would be likely to get the victory over his caution, his vanity, or his ambition.

An ambitious man, too, when he found himself seated on the summit of his country's honors, when he looked forward to the time at which he must descend from the exalted eminence forever, and reflected that no exertion of merit on his part could save him from the unwelcome reverse; such a man, in such a situation, would be much more violently tempted to embrace a favorable conjuncture for attempting the prolongation of his power, at every personal hazard, than if he had the probability of answering the same end by doing his duty.

Would it promote the peace of the community, or the stability of the government, to have half a dozen men who had had credit enough to be raised to the seat of the supreme magistracy wandering among the people like

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discontented ghosts, and sighing for a place which they were destined never more to possess? [1]

A third ill effect of the exclusion would be the depriving the community of the advantage of the experience gained by the chief magistrate in the exercise of his office. That experience is the parent of wisdom is an adage the truth of which is recognized by the wisest as well the simplest of mankind. What more desirable or more essential than this quality in the governors of nations? Where more desirable or more essential than in the first magistrate of a nation? Can it be wise to put this desirable and essential quality under the ban of the Constitution, and to declare that the moment it is acquired its possessor shall be compelled to abandon the station in which it was acquired, and to which it is adapted? This, nevertheless, is the precise import of all those regulations which exclude men from serving their country by the choice of their fellow-citizens, after they have by a course of service fitted themselves for doing it with a greater degree of utility.

A fourth ill effect of the exclusion would be the banishing men from stations in which, in certain emergencies of the state, their presence might be of the greatest moment to the public interest or safety. There is no nation which has not, at one period or another, experienced an absolute necessity of the services of particular men in particular situations; perhaps it would not be too strong to say, to the preservation of its political existence.[2] How unwise, therefore, must be every such self-denying ordinance as serves to prohibit a nation from making use of its own citizens in the manner best suited to its exigencies and circumstances! Without supposing the personal essentiality of the man, it is evident that a change of the chief magistrate at the breaking out of a

[1] Improbable as this now seems, one has but to study the intrigues of Aaron Burr, after his retirement from the vice presidency, to see how much force this reasoning then carried.—EDITOR.

[2] Had the presidential term been limited to four years, a very dangerous crisis would have occurred in 1864.—EDITOR.

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war, or at any similar crisis, for another, even of equal merit, would at all times be detrimental to the community, inasmuch as it would substitute inexperience to experience, and would tend to unhinge and set afloat the already settled train of the administration.

A fifth ill effect of the exclusion would be that it would operate as a constitutional interdiction of stability in the administration. By *necessitating* a change of men in the first office of the nation, it would necessitate a mutability of measures. It is not generally to be expected that men will vary and measures remain uniform. The contrary is the usual course of things. And we need not be apprehensive that there will be too much stability while there is even the option of changing; nor need we desire to prohibit the people from continuing their confidence where they think it may be safely placed, and where, by constancy on their part, they may obviate the fatal inconveniences of fluctuating councils and a variable policy.

These are some of the disadvantages which would flow from the principle of exclusion. They apply most forcibly to the scheme of a perpetual exclusion; but when we consider that even a partial exclusion would always render the readmission of the person a remote and precarious object, the observations which have been made will apply nearly as fully to one case as to the other.

What are the advantages promised to counterbalance these disadvantages? They are represented to be: 1st, greater independence in the magistrate; 2d, greater security to the people. Unless the exclusion be perpetual, there will be no pretense to infer the first advantage. But even in that case, may he have no object beyond his present station to which he may sacrifice his independence? May he have no connections, no friends for whom he may sacrifice it? May he not be less willing, by a firm conduct, to make personal enemies when he acts under the impression that a time is fast approaching on the arrival of which he not only MAY, but MUST, be

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exposed to their resentments, upon an equal, perhaps upon an inferior, footing? It is not an easy point to determine whether his independence would be most promoted or impaired by such an arrangement.

As to the second supposed advantage, there is still greater reason to entertain doubts concerning it. If the exclusion were to be perpetual, a man of irregular ambition, of whom alone there could be reason in any case to entertain apprehension, would with infinite reluctance yield to the necessity of taking his leave forever of a post in which his passion for power and pre-eminence had acquired the force of habit. And if he had been fortunate or adroit enough to conciliate the good will of the people, he might induce them to consider as a very odious and unjustifiable restraint upon themselves a provision which was calculated to debar them of the right of giving a fresh proof of their attachment to a favorite. There may be conceived circumstances in which this disgust of the people, seconding the thwarted ambition of such a favorite, might occasion greater danger to liberty than could ever reasonably be dreaded from the possibility of a perpetuation in office by the voluntary suffrages of the community, exercising a constitutional privilege.

There is an excess of refinement in the idea of disabling the people to continue in office men who had entitled themselves in their opinion to approbation and confidence, the advantages of which are at best speculative and equivocal and are overbalanced by disadvantages far more certain and decisive. PUBLIUS.

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No. 73 [72]. (*New York Packet*, March 21, 1788.) Hamilton.

THE PRESIDENTIAL SALARY AND VETO.

Without suitable provision the Executive will be at the mercy of the legislature, and the independence of the Executive should not be impaired — The veto power—Reasons for and against, enumerated and considered— The veto power not absolute—It already exists in New York and Massachusetts.

To the People of the State of New York:

The third ingredient towards constituting the vigor of the executive authority is an adequate provision for its support. It is evident that, without proper attention to this article, the separation of the executive from the legislative department would be merely nominal and nugatory. The legislature, with a discretionary power over the salary and emoluments of the Chief Magistrate, could render him as obsequious to their will as they might think proper to make him. They might in most cases either reduce him by famine, or tempt him by largesses, to surrender at discretion his judgment to their inclinations. These expressions, taken in all the latitude of the terms, would no doubt convey more than is intended. There are men who could neither be distressed nor won into a sacrifice of their duty; but this stern virtue is the growth of few souls; and in the main it will be found that a power over a man's support is a power over his will. If it were necessary to confirm so plain a truth by facts, examples would not be wanting, even in this country, of the intimidation or seduction of the Executive by the terrors or allurements of the pecuniary arrangements of the legislative body.[1]

See No. 79.

[1] Among innumerable instances, the conduct of Governor Denny of Pennsylvania is a good example. He had been bound, by his instructions from the proprietors, to dissent from any bill which should tax their lands. When he obeyed these instructions the Assembly refused to vote him his salary, and finally compelled him to accede to such legislation as they chose.—EDITOR.

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It is not easy, therefore, to commend too highly the judicious attention which has been paid to this subject in the proposed Constitution. It is there provided that "The President of the United States shall, at stated times, receive for his service a compensation *which shall neither be increased nor diminished during the period for which he shall have been elected;* and he *shall not receive within that period any other emolument* from the United States, or any of them." It is impossible to imagine any provision which would have been more eligible than this. The legislature, on the appointment of a President, is once for all to declare what shall be the compensation for his services during the time for which he shall have been elected. This done, they will have no power to alter it, either by increase or diminution, till a new period of service by a new election commences. They can neither weaken his fortitude by operating on his necessities, nor corrupt his integrity by appealing to his avarice. Neither the Union nor any of its members will be at liberty to give, nor will he be at liberty to receive, any other emolument than that which may have been determined by the first act. He can, of course, have no pecuniary inducement to renounce or desert the independence intended for him by the Constitution.

The last of the requisites to energy which have been enumerated are competent powers. Let us proceed to consider those which are proposed to be vested in the President of the United States.

The first thing that offers itself to our observation is the qualified negative of the President upon the acts or resolutions of the two houses of the legislature; or, in other words, his power of returning all bills with objections to have the effect of preventing their becoming laws, unless they should afterwards be ratified by two-thirds of each of the component members of the legislative body.

The propensity of the legislative department to intrude upon the rights and to absorb the powers of the other departments has been already suggested and repeated;

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the insufficiency of a mere parchment delineation of the boundaries of each has also been remarked upon; and the necessity of furnishing each with constitutional arms for its own defense has been inferred and proved.[1] From these clear and indubitable principles results the propriety of a negative, either absolute or qualified, in the Executive upon the acts of the legislative branches. Without the one or the other, the former would be absolutely unable to defend himself against the depredations of the latter. He might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote. And in the one mode or the other the legislative and executive powers might speedily come to be blended in the same hands. If even no propensity had ever discovered itself in the legislative body to invade the rights of the Executive, the rules of just reasoning and theoretic propriety would of themselves teach us that the one ought not to be left to the mercy of the other, but ought to possess a constitutional and effectual power of self-defense.

See No. 69.

But the power in question has a further use. It not only serves as a shield to the Executive, but it furnishes an additional security against the enaction of improper

[1] Twice the veto power has served this purpose in a limited manner: in the contests of Congress with President Johnson over reconstruction, and with President Hayes over riders (see note, p. 330). Another prolific cause of the presidential negative has been the congressional predilection for internal improvements, which was chiefly responsible for the vetoes by Madison, Jackson, Pierce, and the later outburst of special pension legislation which led to frequent vetoes by Grant and Cleveland. It is interesting to note that as a rule the veto power has not been most used when the President and Congress belonged to different political parties, but in those few cases in which the President and his own party have disagreed. Thus the chief uses of the veto have been by Presidents nominally in accord with the majority of Congress, especially by Jackson, Tyler, Johnson, and Cleveland. Congresses openly opposed to the President have not wasted their time in passing bills certain to be vetoed (except during Johnson's presidency, when Congress had the necessary two-thirds party vote to override a negative), while a President and Congress in true accord have worked together sufficiently to make vetoes needless; and this has had a tendency to make a President loath to discredit the congressional majority of his own party. See "Veto Messages of the Presidents of the United States. Washington, 1886."—EDITOR.

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laws. It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good which may happen to influence a majority of that body.

The propriety of a negative has, upon some occasions, been combated by an observation that it was not to be presumed a single man would possess more virtue and wisdom than a number of men; and that, unless this presumption should be entertained, it would be improper to give the executive magistrate any species of control over the legislative body.

But this observation, when examined, will appear rather specious than solid. The propriety of the thing does not turn upon the supposition of superior wisdom or virtue in the Executive, but upon the supposition that the legislature will not be infallible; that the love of power may sometimes betray it into a disposition to encroach upon the rights of other members of the government; that a spirit of faction may sometimes pervert its deliberations; that impressions of the moment may sometimes hurry it into measures which itself, on maturer reflection, would condemn. The primary inducement to conferring the power in question upon the Executive is to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws through haste, inadvertence, or design. The oftener the measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest. It is far less probable that culpable views of any kind should infect all the parts of the government at the same moment, and in relation to the same object, than that they should by turns govern and mislead every one of them.

It may perhaps be said that the power of preventing

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bad laws includes that of preventing good ones, and may be used to the one purpose as well as to the other. But this objection will have little weight with those who can properly estimate the mischiefs of that inconstancy and mutability in the laws which form the greatest blemish in the character and genius of our governments. They will consider every institution calculated to restrain the excess of lawmaking, and to keep things in the same state in which they happen to be at any given period, as much more likely to do good than harm; because it is favorable to greater stability in the system of legislation. The injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones.

Nor is this all. The superior weight and influence of the legislative body in a free government, and the hazard to the Executive in a trial of strength with that body, afford a satisfactory security that the negative would generally be employed with great caution, and there would oftener be room for a charge of timidity than of rashness in the exercise of it. A king of Great Britain, with all his train of sovereign attributes, and with all the influence he draws from a thousand sources, would at this day hesitate to put a negative upon the joint resolutions of the two houses of Parliament. He would not fail to exert the utmost resources of that influence to strangle a measure disagreeable to him in its progress to the throne, to avoid being reduced to the dilemma of permitting it to take effect or of risking the displeasure of the nation by an opposition to the sense of the legislative body. Nor is it probable that he would ultimately venture to exert his prerogatives, but in a case of manifest propriety or extreme necessity. All well-informed men in that kingdom will accede to the justness of this remark. A very considerable period has elapsed since the negative of the crown has been exercised.

See No. 69.

If a magistrate so powerful and so well fortified as a British monarch would have scruples about the exercise

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of the power under consideration, how much greater caution may be reasonably expected in a President of the United States, clothed for the short period of four years with the executive authority of a government wholly and purely republican?

It is evident that there would be greater danger of his not using his power when necessary than of his using it too often, or too much. An argument, indeed, against its expediency has been drawn from this very source. It has been represented, on this account, as a power odious in appearance, useless in practice.[1] But it will not follow that, because it might be rarely exercised, it would never be exercised. In the case for which it is chiefly designed, that of an immediate attack upon the constitutional rights of the Executive, or in a case in which the public good was evidently and palpably sacrificed, a man of tolerable firmness would avail himself of his constitutional means of defense, and would listen to the admonitions of duty and responsibility. In the former supposition, his fortitude would be stimulated by his immediate interest in the power of his office; in the latter, by the probability of the sanction of his constituents, who, though they would naturally incline to the legislative body in a doubtful case, would hardly suffer their partiality to delude them in a very plain case. I speak now with an eye to a magistrate possessing only a common share of firmness. There are men who, under any circumstances, will have the courage to do their duty at every hazard.

But the convention have pursued a mean in this business which will both facilitate the exercise of the power

[1] As a fact the use of the veto power has had a firmer popular support than any other presidential prerogative, and the two Presidents who have made themselves most popular (without factitious circumstances) after taking office (Jackson and Cleveland) have done so largely through their use of this power. It is interesting to note that Jefferson records in regard to the first veto of Washington that "a few of the hottest friends of the bill expressed passion, but the majority were satisfied, and both in and out of doors it gave pleasure to have at length an instance of the negative being exercised."—EDITOR.

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vested in this respect in the executive magistrate, and make its efficacy to depend on the sense of a considerable part of the legislative body. Instead of an absolute negative, it is proposed to give the Executive the qualified negative already described. This is a power which would be much more readily exercised than the other. A man who might be afraid to defeat a law by his single VETO might not scruple to return it for reconsideration; subject to being finally rejected only in the event of more than one-third of each house concurring in the sufficiency of his objections. He would be encouraged by the reflection that, if his opposition should prevail, it would embark in it a very respectable proportion of the legislative body, whose influence would be united with his in supporting the propriety of his conduct in the public opinion. A direct and categorical negative has something in the appearance of it more harsh, and more apt to irritate, than the mere suggestion of argumentative objections to be approved or disapproved by those to whom they are addressed. In proportion as it would be less apt to offend, it would be more apt to be exercised; and for this very reason, it may in practice be found more effectual. It is to be hoped that it will not often happen that improper views will govern so large a proportion as two-thirds of both branches of the legislature at the same time; and this, too, in spite of the counterpoising weight of the Executive. It is at any rate far less probable that this should be the case than that such views should taint the resolutions and conduct of a bare majority. A power of this nature in the Executive will often have a silent and unperceived, though forcible, operation. When men engaged in unjustifiable pursuits are aware that obstructions may come from a quarter which they cannot control, they will often be restrained by the bare apprehension of opposition from doing what they would with eagerness rush into if no such external impediments were to be feared.

This qualified negative, as has been elsewhere remarked, is in this State vested in a council, consisting of

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the governor, with the chancellor and judges of the Supreme Court, or any two of them.[1] It has been freely employed upon a variety of occasions, and frequently with success. And its utility has become so apparent that persons who, in compiling the Constitution, were violent opposers of it, have from experience become its declared admirers.*

See Nos. 69, 70, and 76.

I have in another place remarked that the convention, in the formation of this part of their plan, had departed from the model of the constitution of this State in favor of that of Massachusetts. Two strong reasons may be imagined for this preference. One is that the judges, who are to be the interpreters of the law, might receive an improper bias from having given a previous opinion in their revisionary capacities; the other is that, by being often associated with the Executive, they might be induced to embark too far in the political views of that magistrate, and thus a dangerous combination might by degrees be cemented between the executive and judiciary departments. It is impossible to keep the judges too distinct from every other avocation than that of expounding the laws. It is peculiarly dangerous to place them in a situation to be either corrupted or influenced by the Executive.

PUBLIUS.

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* Mr. Abraham Yates, a warm opponent of the plan of the convention, is of this number.—PUBLIUS.

[1] It is now vested solely in the governor.—EDITOR.

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No. 74 [73]. (*New York Packet*, March 25, 1788.) Hamilton.

THE PRESIDENTIAL COMMAND OF NATIONAL FORCES AND POWER OF PARDON.

Command over army and navy and militia—Power to consult executive officials—Need of the pardoning power—Special consideration of the pardoning power as regards treason—Advantage of prompt use of pardon—Incident of Massachusetts—Loss of time if pardoning power were vested in legislature.

To the People of the State of New York:

The President of the United States is to be "commander-in-chief of the army and navy of the United States, and of the militia of the several States *when called into the actual service* of the United States." The propriety of this provision is so evident in itself, and it is at the same time so consonant to the precedents of the State constitutions in general, that little need be said to explain or enforce it. Even those of them which have, in other respects, coupled the chief magistrate with a council have for the most part concentrated the military authority in him alone. Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority.[1]

"The President may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective

[1] In this brief paragraph is dismissed the gravest problem which our government has yet encountered regarding the presidential power. Had Mr. Bagehot investigated with any care the history of the wars of 1812 and 1861 he would probably have found our government sufficiently "elastic"; for, as Mr. Bryce remarks, the powers of the President "in war time, and especially in civil war," expand with "portentous speed." Indeed, Lincoln went so far as to assert that "as commander in-chief of the army

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offices." This I consider as a mere redundancy in the plan, as the right for which it provides would result of itself from the office.

He is also to be authorized to grant "reprieves and pardons for offenses against the United States, *except in cases of impeachment.*" Humanity and good policy conspire to dictate that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity that, without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. As the sense of responsibility is always strongest in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance. The reflection that the fate of a fellow-creature depended on his *sole fiat* would naturally inspire scrupulousness and caution; the dread of being accused of weakness or connivance would beget equal circumspection, though of a different kind. On the other hand, as men generally derive confidence from their numbers, they might often encourage each other in an act of obduracy, and might be less sensible to the apprehension of suspicion or censure for an injudicious or affected clemency. On these accounts, one man appears to be a more eligible dispenser of the mercy of government than a body of men.

The expediency of vesting the power of pardoning in the President has, if I mistake not, been only contested in relation to the crime of treason. This, it has been urged, ought to have depended upon the assent of one, or both, of the branches of the legislative body. I shall

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and navy, in time of war, I suppose I have a right to take any measures which may best subdue the enemy." Concerning this use of war power during the Civil War see Curtis's "Executive Power," 1862; Lowrey's "The Commander-in-Chief." 1866; Dunning's "The Constitution of the United States in Civil War" (*Political Science Quarterly*, vol. i. 1886), and Whiting's "War Powers of the President," 1864.—EDITOR.

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not deny that there are strong reasons to be assigned for requiring in this particular the concurrence of that body, or of a part of it. As treason is a crime leveled at the immediate being of the society, when the laws have once ascertained the guilt of the offender, there seems a fitness in referring the expediency of an act of mercy towards him to the judgment of the legislature. And this ought the rather to be the case, as the supposition of the connivance of the Chief Magistrate ought not to be entirely excluded. But there are also strong objections to such a plan. It is not to be doubted that a single man of prudence and good sense is better fitted, in delicate conjunctures, to balance the motives which may plead for and against the remission of the punishment than any numerous body whatever. It deserves particular attention that treason will often be connected with seditions which embrace a large proportion of the community, as lately happened in Massachusetts. In every such case we might expect to see the representation of the people tainted with the same spirit which had given birth to the offense. And when parties were pretty equally matched the secret sympathy of the friends and favorers of the condemned person, availing itself of the good-nature and weakness of others, might frequently bestow impunity where the terror of an example was necessary. On the other hand, when the sedition had proceeded from causes which had inflamed the resentments of the major party, they might often be found obstinate and inexorable when policy demanded a conduct of forbearance and clemency. But the principal argument for reposing the power of pardoning in this case to the Chief Magistrate is this: in seasons of insurrection or rebellion there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall. The dilatory process of convening the legislature, or one of its branches, for the purpose of obtaining its sanction to the measure, would frequently be the occasion of letting slip

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the golden opportunity. The loss of a week, a day, an hour, may sometimes be fatal. If it should be observed that a discretionary power, with a view to such contingencies, might be occasionally conferred upon the President, it may be answered, in the first place, that it is questionable whether, in a limited Constitution, that power could be delegated by law; and in the second place, that it would generally be impolitic beforehand to take any step which might hold out the prospect of impunity. A proceeding of this kind, out of the usual course, would be likely to be construed into an argument of timidity or of weakness, and would have a tendency to embolden guilt. PUBLIUS.

No. 75 [74]. (*Independent Journal*, March 26, 1788.) Hamilton.

THE PRESIDENTIAL POWER IN TREATIES.

One of the best features of the constitution—Objection that it combines the executive and legislative departments considered—It is a proper combination—Reasons for this—House of Representatives cannot properly be admitted—Objection to requiring only two-thirds of senators present.

To the People of the State of New York:

The President is to have power, "by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur."

Though this provision has been assailed on different grounds with no small degree of vehemence, I scruple not to declare my firm persuasion that it is one of the best digested and most unexceptionable parts of the plan. One ground of objection is the trite topic of the intermixture of powers: some contending that the President ought alone to possess the power of making treaties; others, that it ought to have been exclusively deposited in the Senate. Another source of objection is derived from the small number of persons by whom a treaty may be made. Of those who espouse this objection, a part are of opinion that the

See No. 64.

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House of Representatives ought to have been associated in the business, while another part seem to think that nothing more was necessary than to have substituted two-thirds of *all* the members of the Senate to two-thirds of the members *present*. As I flatter myself the observations made in a preceding number upon this part of the plan must have sufficed to place it, to a discerning eye, in a very favorable light, I shall here content myself with offering only some supplementary remarks, principally with a view to the objections which have been just stated.

With regard to the intermixture of powers, I shall rely upon the explanations already given in other places, of the true sense of the rule upon which that objection is founded; and shall take it for granted, as an inference from them, that the union of the Executive with the Senate, in the article of treaties, is no infringement of that rule. I venture to add that the particular nature of the power of making treaties indicates a peculiar propriety in that union. Though several writers on the subject of Government place that power in the class of executive authorities, yet this is evidently an arbitrary disposition; for, if we attend carefully to its operation, it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them. The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society; while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate. The power of making treaties is plainly neither the one nor the other. It relates neither to the execution of the subsisting laws nor to the enaction of new ones, and still less to an exertion of the common strength. Its objects are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in

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question seems, therefore, to form a distinct department, and to belong, properly, neither to the legislative nor to the executive. The qualities elsewhere detailed as indispensable in the management of foreign negotiations point out the Executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.

However proper or safe it may be, in governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to intrust that power to an elective magistrate of four years' duration. It has been remarked upon another occasion, and the remark is unquestionably just, that an hereditary monarch, though often the oppressor of his people, has personally too much stake in the government to be in any material danger of being corrupted by foreign powers. But a man raised from the station of a private citizen to the rank of chief magistrate, possessed of a moderate or slender fortune, and looking forward to a period not very remote when he may probably be obliged to return to the station from which he was taken, might sometimes be under temptations to sacrifice his duty to his interest which it would require superlative virtue to withstand. An avaricious man might be tempted to betray the interests of the state to the acquisition of wealth. An ambitious man might make his own aggrandizement, by the aid of a foreign power, the price of his treachery to his constituents. The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.

To have intrusted the power of making treaties to the Senate alone would have been to relinquish the benefits

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of the constitutional agency of the President in the conduct of foreign negotiations. It is true that the Senate would, in that case, have the option of employing him in this capacity, but they would also have the option of letting it alone, and pique or cabal might induce the latter rather than the former. Besides this, the ministerial servant of the Senate could not be expected to enjoy the confidence and respect of foreign powers in the same degree with the constitutional representatives of the nation, and, of course, would not be able to act with an equal degree of weight or efficacy. While the Union would, from this cause, lose a considerable advantage in the management of its external concerns, the people would lose the additional security which would result from the co-operation of the Executive. Though it would be imprudent to confide in him solely so important a trust, yet it cannot be doubted that his participation would materially add to the safety of the society. It must indeed be clear to a demonstration that the joint possession of the power in question, by the President and Senate, would afford a greater prospect of security than the separate possession of it by either of them. And whoever has maturely weighed the circumstances which must concur in the appointment of a President, will be satisfied that the office will always bid fair to be filled by men of such characters as to render their concurrence in the formation of treaties peculiarly desirable, as well on the score of wisdom, as on that of integrity.

The remarks made in a former number, which have been alluded to in another part of this paper, will apply with conclusive force against the admission of the House of Representatives to a share in the formation of treaties. The fluctuating and, taking its future increase into the account, the multitudinous composition of that body, forbid us to expect in it those qualities which are essential to the proper execution of such a trust. Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character; decision,

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secrecy, and dispatch, are incompatible with the genius of a body so variable and so numerous. The very complication of the business, by introducing a necessity of the concurrence of so many different bodies, would of itself afford a solid objection. The greater frequency of the calls upon the House of Representatives, and the greater length of time which it would often be necessary to keep them together when convened, to obtain their sanction in the progressive stages of a treaty, would be a source of so great inconvenience and expense as alone ought to condemn the project.

The only objection which remains to be canvassed is that which would substitute the proportion of two-thirds of all the members composing the senatorial body to that of two-thirds of the members *present*. It has been shown, under the second head of our inquiries, that all provisions which require more than the majority of any body to its resolutions have a direct tendency to embarrass the operations of the government, and an indirect one to subject the sense of the majority to that of the minority. This consideration seems sufficient to determine our opinion, that the convention have gone as far in the endeavor to secure the advantage of numbers in the formation of treaties as could have been reconciled either with the activity of the public councils or with a reasonable regard to the major sense of the community. If two-thirds of the whole number of members had been required, it would, in many cases, from the non-attendance of a part, amount in practice to a necessity of unanimity. And the history of every political establishment in which this principle has prevailed is a history of impotence, perplexity, and disorder. Proofs of this position might be adduced from the examples of the Roman Tribuneship, the Polish Diet, and the States-General of the Netherlands, did not an example at home render foreign precedents unnecessary.

To require a fixed proportion of the whole body would not, in all probability, contribute to the advantages of a numerous agency, better than merely to require a pro-

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portion of the attending members. The former, by making a determinate number at all times requisite to a resolution,[1] diminishes the motives to punctual attendance. The latter, by making the capacity of the body to depend on a *proportion* which may be varied by the absence or presence of a single member, has the contrary effect. And as, by promoting punctuality, it tends to keep the body complete, there is great likelihood that its resolutions would generally be dictated by as great a number in this case as in the other; while there would be much fewer occasions of delay. It ought not to be forgotten that, under the existing Confederation, two members *may*, and usually *do*, represent a State; whence it happens that Congress, who now are solely invested with *all the powers* of the Union, rarely consist of a greater number of persons than would compose the intended Senate. If we add to this that as the members vote by States, and that where there is only a single member present from a State, his vote is lost, it will justify a supposition that the active voices in the Senate, where the members are to vote individually, would rarely fall short in number of the active voices in the existing Congress. When, in addition to these considerations, we take into view the co-operation of the President, we shall not hesitate to infer that the people of America would have greater security against an improper use of the power of making treaties, under the new Constitution, than they now enjoy under the Confederation. And when we proceed still one step further, and look forward to the probable augmentation of the Senate, by the erection of new States, we shall not only perceive ample ground of confidence in the sufficiency of the members to whose agency that power will be intrusted, but we shall probably be led to conclude that a body more numerous than the Senate would be likely to become, would be very little fit for the proper discharge of the trust.

PUBLIUS.

[1] In the text of 1802: "The former, by increasing the difficulty of resolutions disagreeable to the minority."—EDITOR.

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No. 76 [75]. (*New York Packet*, April 1, 1788.) Hamilton.

PRESIDENTIAL POWER OF APPOINTMENT.

An excellent feature—This power cannot be exercised by the people at large—It will cause a livelier sense of duty—Objection to its being intrusted to the President alone—He may be overruled by Senate—Concurrence of Senate a check on favoritism—Objection that the President may thus control Senate considered—Whole body of Senate cannot be corrupted—Protection of constitution.

To the People of the State of New York:

The President is "to *nominate*, and, by and with the advice and consent of the Senate, to appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not otherwise provided for in the Constitution. But the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, or in the courts of law, or in the heads of departments. The President shall have power to fill up *all vacancies* which may happen *during the recess of the Senate*, by granting commissions which shall *expire* at the end of their next session."

It has been observed in a former paper that "the true test of a good government is its aptitude and tendency to produce a good administration." If the justness of this observation be admitted, the mode of appointing the officers of the United States contained in the foregoing clauses must, when examined, be allowed to be entitled to particular commendation. It is not easy to conceive a plan better calculated than this to promote a judicious choice of men for filling the offices of the Union; and it will not need proof that on this point must essentially depend the character of its administration.

It will be agreed on all hands that the power of appointment, in ordinary cases, ought to be modified in one of three ways. It ought either to be vested in

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a single man, or in a *select* assembly of a moderate number; or in a single man, with the concurrence of such an assembly. The exercise of it by the people at large will be readily admitted to be impracticable; as, waiving every other consideration, it would leave them little time to do anything else. When, therefore, mention is made in the subsequent reasonings of an assembly or body of men, what is said must be understood to relate to a select body or assembly of the description already given. The people collectively, from their number and from their dispersed situation, cannot be regulated in their movements by that systematic spirit of cabal and intrigue which will be urged as the chief objections to reposing the power in question in a body of men.

Those who have themselves reflected upon the subject, or who have attended to the observations made in other parts of these papers, in relation to the appointment of the President, will, I presume, agree to the position that there would always be great probability of having the place supplied by a man of abilities, at least, respectable. Premising this, I proceed to lay it down as a rule that one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices than a body of men of equal or perhaps even of superior discernment.

The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them. He will have *fewer* personal attachments to gratify than a body of men who may each be supposed to have an equal number; and will be so much the less liable to be misled by the sentiments of friendship and of affection. A single well-directed man, by a single understanding, cannot be distracted and warped by that diversity of

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views, feelings, and interests which frequently distract and warp the resolutions of a collective body. There is nothing so apt to agitate the passions of mankind as personal considerations, whether they relate to ourselves or to others who are to be the objects of our choice or preference. Hence, in every exercise of the power of appointing to offices by an assembly of men, we must expect to see a full display of all the private and party likings and dislikes, partialities and antipathies, attachments and animosities, which are felt by those who compose the assembly. The choice which may at any time happen to be made under such circumstances will of course be the result either of a victory gained by one party over the other, or of a compromise between parties. In either case, the intrinsic merit of the candidate will be too often out of sight. In the first, the qualifications best adapted to uniting the suffrages of the party will be more considered than those which fit the person for the station. In the last, the coalition will commonly turn upon some interested equivalent: "Give us the man we wish for this office, and you shall have the one you wish for that."[1] This will be the usual condition of the bargain. And it will rarely happen that the advancement of the public service will be the primary object either of party victories or of party negotiations.

See No. 55.

The truth of the principles here advanced seems to have been felt by the most intelligent of those who have found fault with the provision made, in this respect, by the convention. They contend that the President ought solely to have been authorized to make the appointments under the federal government. But it is easy to show that every advantage to be expected from such an arrangement would, in substance, be derived from the

[1] It has frequently happened that the Executive has influenced legislation by giving to the members of Congress offices with which to reward their adherents. But an even closer approximation to this suggested danger has been created in the so-called "senatorial courtesy," by which the Senate rejects a nominee simply because he is opposed by the senator of the particular state from which such nominee may hail.—EDITOR.

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power of *nomination*, which is proposed to be conferred upon him; while several disadvantages which might attend the absolute power of appointment in the hands of that officer would be avoided. In the act of nomination, his judgment alone would be exercised; and as it would be his sole duty to point out the man who, with the approbation of the Senate, should fill an office, his responsibility would be as complete as if he were to make the final appointment. There can, in this view, be no difference between nominating and appointing. The same motives which would influence a proper discharge of his duty in one case would exist in the other. And as no man could be appointed but on his previous nomination, every man who might be appointed would be, in fact, his choice.

But might not his nomination be overruled? I grant it might; yet this could only be to make place for another nomination by himself. The person ultimately appointed must be the object of his preference, though perhaps not in the first degree. It is also not very probable that his nomination would often be overruled. The Senate could not be tempted, by the preference they might feel to another, to reject the one proposed; because they could not assure themselves that the person they might wish would be brought forward by a second or by any subsequent nomination. They could not even be certain that a future nomination would present a candidate in any degree more acceptable to them; and as their dissent might cast a kind of stigma upon the individual rejected and might have the appearance of a reflection upon the judgment of the Chief Magistrate, it is not likely that their sanction would often be refused where there were not special and strong reasons for the refusal.

See No. 66.

To what purpose, then, require the co-operation of the Senate? I answer that the necessity of their concurrence would have a powerful though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to

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prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.[1] In addition to this, it would be an efficacious source of stability in the administration.

It will readily be comprehended that a man who had himself the sole disposition of offices would be governed much more by his private inclinations and interests than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body, and that body an entire branch of the legislature. The possibility of rejection would be a strong motive to care in proposing. The danger to his own reputation and, in the case of an elective magistrate, to his political existence, from betraying a spirit of favoritism, or an unbecoming pursuit of popularity, to the observation of a body whose opinion would have great weight in forming that of the public, could not fail to operate as a barrier to the one and to the other. He would be both ashamed and afraid to bring forward for the most distinguished or lucrative stations candidates who had no other merit than that of coming from the same State to which he particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure.

To this reasoning it has been objected that the President, by the influence of the power of nomination, may secure the complaisance of the Senate to his views. This supposition of universal venality in human nature is little less an error in political reasoning than the supposition of universal rectitude. The institution of delegated power implies that there is a portion of virtue and honor among mankind which may be a reasonable foundation of confidence; and experience justifies the theory. It has been found to exist in the most corrupt

[1] This was proved to the contrary in the administration of John Adams, when a complacent Senate confirmed several family appointments.—EDITOR.

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periods of the most corrupt governments. The venality of the British House of Commons has been long a topic of accusation against that body, in the country to which they belong as well as in this; and it cannot be doubted that the charge is, to a considerable extent, well founded. But it is as little to be doubted that there is always a large proportion of the body which consists of independent and public-spirited men, who have an influential weight in the councils of the nation. Hence it is (the present reign not excepted) that the sense of that body is often seen to control the inclinations of the monarch, both with regard to men and to measures. Though it might therefore be allowable to suppose that the Executive might occasionally influence some individuals in the Senate, yet the supposition that he could in general purchase the integrity of the whole body would be forced and improbable. A man disposed to view human nature as it is, without either flattering its virtues or exaggerating its vices, will see sufficient ground of confidence in the probity of the Senate to rest satisfied, not only that it will be impracticable to the Executive to corrupt or seduce a majority of its members, but that the necessity of its co-operation, in the business of appointments, will be a considerable and salutary restraint upon the conduct of that magistrate. Nor is the integrity of the Senate the only reliance. The Constitution has provided some important guards against the danger of executive influence upon the legislative body: it declares that "No senator or representative shall, during the time *for which he was elected*, be appointed to any civil office under the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person, holding any office under the United States, shall be a member of either house during his continuance in office."

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No. 77 [76]. (*Independent Journal*, April 2, 1788.) Hamilton.

APPOINTMENT TO OFFICE AND REMAINING POWERS OF PRESIDENT.

The concurrence of the Senate necessary to displace as well as to appoint—Objections as to undue control of the Senate by the President or the reverse considered—Compared with system of appointment in New York—Appointing power should be delegated to a council or shared in by the House—Power to communicate information to Congress—To recommend measures to Congress—To convene one or both branches of Congress—To adjourn Congress—To receive ambassadors and other public ministers—To execute the laws of the Union—To commission all officers of the United States—Concluding remarks on the Executive.

To the People of the State of New York:

It has been mentioned as one of the advantages to be expected from the co-operation of the Senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint. A change of the Chief Magistrate, therefore, would not occasion so violent or so general a revolution in the officers of the government as might be expected if he were the sole disposer of offices. Where a man in any station had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change in favor of a person more agreeable to him by the apprehension that a discountenance of the Senate might frustrate the attempt and bring some degree of discredit upon himself.[1] Those who can

See No. 55.

[1] In No. 55 Hamilton argued that vacancies would only result from "ordinary casualities," thus apparently not conceiving, as he does here, the possibility of sweeping removals with each incoming President. This practice has since become almost the greatest recurring disgrace of our national politics, and, as noted elsewhere, the most debauching influence on public morals, next to pensions, for which our general government is responsible. It has been usual to ascribe the origin of this policy to Jefferson, and from hence to argue a peculiarly democratic merit in the system. But in this case the true evil, begun before the election of the great Democrat, was the elevation to, or exclusion from, office of men

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best estimate the value of a steady administration will be most disposed to prize a provision which connects the official existence of public men with the approbation or disapprobation of that body which, from the greater permanency of its own composition, will in all probability be less subject to inconstancy than any other member of the government.

To this union of the Senate with the President, in the article of appointments, it has in some cases been suggested that it would serve to give the President an undue influence over the Senate, and in others that it would have an opposite tendency—a strong proof that neither suggestion is true.

To state the first in its proper form is to refute it. It amounts to this: The President would have an improper

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not because they were fit or unfit for the public service, but because they chose to hold personal views on politics. Thus the system is really an endeavor to force men to certain political opinions, and is therefore in its very essence undemocratic.

The early history of removals possesses material value. In Washington's administration appointments were made solely for fitness, with scarcely any consideration of the party views of the nominees, and this led Adams to complain that "Washington appointed a multitude of democrats and jacobins." Furthermore, from the Secretary of State, Jefferson, to the translating clerk in that department, Freneau, office-holders were allowed their own opinions, differ as they might from the President. In the whole eight years not one was removed or asked to resign because of his politics; and tenure was secure so long as each official did his work honestly and capably. When Adams succeeded, he for the first time introduced the system of appointing or removing public officials on account of their opinion, and thus, when Jefferson was elected to the presidency, he found a civil service which had been picked, not for efficient administration, but for partisan purposes, and which consisted for the most part of men notoriously opposed to him and to his administrative policy. Yet he only removed a very few of the extremists, and for this necessity he was hardly responsible. Unfortunately, those early precedents of Adams and Jefferson, and especially the supposed democracy of the latter's action, made it possible for Jackson, who came into office with a dislike for the established civil service, to introduce a wholesale sweep, not merely to remove officials, but to reward his adherents with vacancies thus created. From that demoralization of office-holder and office-seeker alike we have suffered ever since; but fortunately the extension of the civil service laws under the later Presidents promises to end eventually the least democratic element in our government. It is memorable that when Jackson set about his removals the Senate did its best to prevent the wrong, just as it was here suggested that that body would.—EDITOR.

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influence over the Senate, because the Senate would have the power of *restraining* him. This is an absurdity in terms. It cannot admit of a doubt that the entire power of appointment would enable him much more effectually to establish a dangerous empire over that body than a mere power of nomination subject to their control.

Let us take a view of the converse of the proposition: "the Senate would influence the Executive." As I have had occasion to remark in several other instances, the indistinctness of the objection forbids a precise answer. In what manner is this influence to be exerted? In relation to what objects? The power of influencing a person, in the sense in which it is here used, must imply a power of conferring a benefit upon him. How could the Senate confer a benefit upon the President by the manner of employing their right of negative upon his nominations? If it be said they might sometimes gratify him by an acquiescence in a favorite choice, when public motives might dictate a different conduct, I answer that the instances in which the President could be personally interested in the result would be too few to admit of his being materially affected by the compliances of the Senate. The POWER which can *originate* the disposition of honors and emoluments is more likely to attract than to be attracted by the POWER which can merely obstruct their course. If by influencing the President be meant *restraining* him, this is precisely what must have been intended. And it has been shown that the restraint would be salutary, at the same time that it would not be such as to destroy a single advantage to be looked for from the uncontrolled agency of that magistrate. The right of nomination would produce all the good of that of appointment, and would in a great measure avoid its evils.

See Nos. 69, 70, and 74.

Upon a comparison of the plan for the appointment of the officers of the proposed government with that which is established by the constitution of this State, a decided preference must be given to the former. In that plan the power of nomination is unequivocally vested in the Executive. And as there would be a necessity for submitting each nomination to the

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judgment of an entire branch of the legislature, the circumstances attending an appointment, from the mode of conducting it, would naturally become matters of notoriety; and the public would be at no loss to determine what part had been performed by the different actors. The blame of a bad nomination would fall upon the President singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the Senate; aggravated by the consideration of their having counteracted the good intentions of the Executive. If an ill appointment should be made, the Executive for nominating, and the Senate for approving, would participate, though in different degrees, in the opprobrium and disgrace.

The reverse of all this characterizes the manner of appointment in this State. The council of appointment consists of from three to five persons, of whom the governor is always one. This small body, shut up in a private apartment, impenetrable to the public eye, proceed to the execution of the trust committed to them. It is known that the governor claims the right of nomination, upon the strength of some ambiguous expressions in the constitution; but it is not known to what extent, or in what manner he exercises it; nor upon what occasions he is contradicted or opposed. The censure of a bad appointment, on account of the uncertainty of its author, and for want of a determinate object, has neither poignancy nor duration. And while an unbounded field for cabal and intrigue lies open, all idea of responsibility is lost. The most that the public can know is that the governor claims the right of nomination; that *two* out of the inconsiderable number of *four* men can too often be managed without much difficulty; that if some of the members of a particular council should happen to be of an uncomplying character, it is frequently not impossible to get rid of their opposition by regulating the times of meeting in such a manner as to render their attendance inconvenient; and that, from whatever cause it may proceed, a great number of very improper appointments are from time to time made. Whether a governor of this State avails himself of the ascendant he must necessarily have, in this delicate and important part of the administration, to prefer to offices men who are best qualified for them, or whether he prostitutes that advantage to the advancement of persons whose chief merit is their implicit devotion to his will, and to the support of a despicable and dangerous system of personal influence, are questions which, unfortunately for the community, can only be the subjects of speculation and conjecture.

Every mere council of appointment, however constituted, will be a conclave in which cabal and intrigue

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will have their full scope. Their number, without an unwarrantable increase of expense, cannot be large enough to preclude a facility of combination. And as each member will have his friends and connections to provide for, the desire of mutual gratification will beget a scandalous bartering of votes and bargaining for places. The private attachments of one man might easily be satisfied; but to satisfy the private attachments of a dozen, or of twenty men, would occasion a monopoly of all the principal employments of the government in a few families, and would lead more directly to an aristocracy or an oligarchy than any measure that could be contrived. If, to avoid an accumulation of offices, there was to be a frequent change in the persons who were to compose the council, this would involve the mischiefs of a mutable administration in their full extent. Such a council would also be more liable to executive influence than the Senate, because they would be fewer in number, and would act less immediately under the public inspection. Such a council, in fine, as a substitute for the plan of the convention, would be productive of an increase of expense, a multiplication of the evils which spring from favoritism and intrigue in the distribution of public honors, a decrease of stability in the administration of the government, and a diminution of the security against an undue influence of the Executive. And yet such a council has been warmly contended for as an essential amendment in the proposed Constitution.

I could not with propriety conclude my observations on the subject of appointments without taking notice of a scheme for which there have appeared some, though but few advocates; I mean that of uniting the House of Representatives in the power of making them. I shall, however, do little more than mention it, as I cannot imagine that it is likely to gain the countenance of any considerable part of the community. A body so fluctuating and at the same time so numerous, can never be deemed proper for the exercise of that power. Its unfitness will appear manifest to all, when it is recollected

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that in half a century it may consist of three or four hundred persons. All the advantages of the stability, both of the Executive and of the Senate, would be defeated by this union, and infinite delays and embarrassments would be occasioned. The example of most of the States in their local constitutions encourages us to reprobate the idea.

The only remaining powers of the Executive are comprehended in giving information to Congress of the state of the Union; in recommending to their consideration such measures as he shall judge expedient; in convening them, or either branch, upon extraordinary occasions; in adjourning them when they cannot themselves agree upon the time of adjournment; in receiving ambassadors and other public ministers; in faithfully executing the laws; and in commissioning all the officers of the United States.

Except some cavils about the power of convening *either* house of the legislature, and that of receiving ambassadors, no objection has been made to this class of authorities; nor could they possibly admit of any. It required, indeed, an insatiable avidity for censure to invent exceptions to the parts which have been excepted to. In regard to the power of convening either house of the legislature, I shall barely remark that, in respect to the Senate at least, we can readily discover a good reason for it. As this body has a concurrent power with the Executive in the article of treaties, it might often be necessary to call it together with a view to this object, when it would be unnecessary and improper to convene the House of Representatives. As to the reception of ambassadors, what I have said in a former paper will furnish a sufficient answer.

We have now completed a survey of the structure and powers of the executive department which, I have endeavored to show, combines, as far as republican principles will admit, all the requisites to energy. The remaining inquiry is: Does it also combine the requisites to safety, in a republican sense—a due dependence on the

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people, a due responsibility? The answer to this question has been anticipated in the investigation of its other characteristics, and is satisfactorily deducible from these circumstances: from the election of the President once in four years by persons immediately chosen by the people for that purpose; and from his being at all times liable to impeachment, trial, dismission from office, incapacity to serve in any other, and to forfeiture of life and estate by subsequent prosecution in the common course of law. But these precautions, great as they are, are not the only ones which the plan of the convention has provided in favor of the public security. In the only instances in which the abuse of the executive authority was materially to be feared, the Chief Magistrate of the United States would, by that plan, be subjected to the control of a branch of the legislative body. What more could be desired by an enlightened and reasonable people?

PUBLIUS.

No. 78. (First collected edition, New York, 1788.) Hamilton.

TENURE OF OFFICE OF THE JUDICIAL DEPARTMENT.

Mode of appointment—Tenure—Need of complete independence—Authority to pronounce on the constitutionality of the laws—The legislature should be the judge of its own powers—Interpretation of the laws the peculiar province of the judiciary—Need of independence on this account—Independence required for judiciary as guardians of the Constitution and of private rights as well—Wisdom of requiring good behavior as basis of tenure.

To the People of the State of New York:

We proceed now to an examination of the judiciary department of the proposed government.

In unfolding the defects of the existing Confederation, the utility and necessity of a federal judicature have been clearly pointed out. It is the less necessary to recapitulate the considerations there urged, as the propriety of

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the institution in the abstract is not disputed; the only questions which have been raised being relative to the manner of constituting it, and to its extent. To these points, therefore, our observations shall be confined.

The manner of constituting it seems to embrace these several objects: 1st. The mode of appointing the judges. 2d. The tenure by which they are to hold their places. 3d. The partition of the judiciary authority between different courts, and their relations to each other.

First. As to the mode of appointing the judges: this is the same with that of appointing the officers of the Union in general, and has been so fully discussed in the two last numbers, that nothing can be said here which would not be useless repetition.

Second. As to the tenure by which the judges are to hold their places: this chiefly concerns their duration in office; the provisions for their support; the precautions for their responsibility.

According to the plan of the convention, all judges who may be appointed by the United States are to hold their offices *during good behavior;* which is conformable to the most approved of the State constitutions, and among the rest, to that of this State. Its propriety having been drawn into question by the adversaries of that plan, is no light symptom of the rage for objection which disorders their imaginations and judgments. The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.

Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least

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dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power*; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." † And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by

* The celebrated Montesquieu, speaking of them, says: "Of the three powers above mentioned, the judiciary is next to nothing."—"Spirit of Laws," vol. i. p. 186.—PUBLIUS.

† *Idem*, p. 181.—PUBLIUS.

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its co-ordinate branches; and that, as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.[1]

[1] During the early years of our government this principle, that it was for the federal courts to decide whether acts were constitutional or not, was so little accepted that the Presidents considered themselves judges as well. Washington vetoed the apportionment bill of 1792 on the ground that it did not conform to the constitutional requirements. Jefferson, with more extreme action, holding the alien and sedition acts to be unconstitutional, actually refused to consider them as laws, though they had been passed by Congress and approved by the President. Madison, Monroe, Jackson, Tyler, Polk, and Pierce vetoed internal improvement bills because they believed them to be unconstitutional, and Jackson is quoted as saying that he intended to support the constitution as he "understood it." Slowly, however, opinion has become general that the decision on the constitutionality of an act rests solely with the Supreme Court, and it is many years since the presidential veto has been interposed on this ground.—EDITOR.

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There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.[1]

See No. 81.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute; the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a

[1] See Marshall's opinion in Marbury *v.* Madison, in Appendix.—EDITOR.

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superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

This exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can by any fair construction be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable that, between the interfering acts of an *equal* authority, that which was the last indication of its will should have the preference.

But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the

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duty of the judicial tribunals to adhere to the latter and disregard the former.

It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove anything, would prove that there ought to be no judges distinct from that body.

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men or the influence of particular conjunctures sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government and serious oppressions of the minor party in the community. Though I trust the friends of the proposed Constitution will never concur with its enemies* in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness, yet it is not to be inferred from this principle that the

* *Vide* "Protest of the Minority of the Convention of Pennsylvania," Martin's Speech, etc.—PUBLIUS.

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representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape than when they had proceeded wholly from the cabals of the representative body. Until the people have by some solemn and authoritative act annulled or changed the established form, it is binding upon themselves collectively as well as individually; and no presumption, or even knowledge, of their sentiments can warrant their representatives in a departure from it, prior to such an act. But it is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.

But it is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments than but few may be aware of. The benefits of the integrity and moderation of the judiciary have already been felt in more States than one; and though they may have displeased those whose sinister expec-

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tations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men of every description ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be to-morrow the victim of a spirit of injustice by which he may be a gainer to-day. And every man must now feel that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence and to introduce in its stead universal distrust and distress.

That inflexible and uniform adherence to the rights of the Constitution and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws.

There is yet a further and a weightier reason for the permanency of the judicial offices, which is deducible from the nature of the qualifications they require. It has been frequently remarked with great propriety that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly

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and wickedness of mankind that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us that the government can have no great option between fit characters; and that a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able and less well qualified to conduct it with utility and dignity. In the present circumstances of this country, and in those in which it is likely to be for a long time to come, the disadvantages on this score would be greater than they may at first sight appear; but it must be confessed that they are far inferior to those which present themselves under the other aspects of the subject.

Upon the whole, there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established *good behavior* as the tenure of their judicial offices, in point of duration; and that, so far from being blamable on this account, their plan would have been inexcusably defective if it had wanted this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of the institution.

PUBLIUS.

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No. 79. (First collected edition, New York, 1788.) Hamilton.

SUPPORT AND RESPONSIBILITY OF THE JUDICIARY.

A fixed provision for the support of the judiciary necessary to their independence—Responsibility of the judiciary—Judges liable to impeachment—Cannot be made removable for inability—Reasons for this—Comparison with constitution of New York.

To the People of the State of New York:

Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. The remark made in relation to the President is equally applicable here. In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.* And we can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter. The enlightened friends to good government in every State have seen cause to lament the want of precise and explicit precautions in the State constitutions on this head. Some of these indeed have declared that *permanent** salaries should be established for the judges; but the experiment has in some instances shown that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite. The plan of the convention accordingly has proved that the judges of the United States "shall at *stated times* receive for their services a compensation which shall not be *diminished* during their continuance in office."

See No. 73.

This, all circumstances considered, is the most eligible provision that could have been devised. It will readily be understood that the fluctuations in the value of money

* *Vide* "Constitution of Massachusetts," chapter 2, section 1, article 13.—PUBLIUS.

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and in the state of society rendered a fixed rate of compensation in the Constitution inadmissible. What might be extravagant to-day might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances, yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation. The clause which has been quoted combines both advantages. The salaries of judicial officers may from time to time be altered, as occasion shall require, yet so as never to lessen the allowance with which any particular judge comes into office, in respect to him. It will be observed that a difference has been made by the convention between the compensation of the President and of the judges. That of the former can neither be increased nor diminished; that of the latter can only not be diminished. This probably arose from the difference in the duration of the respective offices. As the President is to be elected for no more than four years, it can rarely happen that an adequate salary, fixed at the commencement of that period, will not continue to be such to its end. But with regard to the judges, who, if they behave properly, will be secured in their places for life, it may well happen, especially in the early stages of the government, that a stipend which would be very sufficient at their first appointment would become too small in the progress of their service.

This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the States in regard to their own judges.

The precautions for their responsibility are comprised in the article respecting impeachments. They are liable

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to be impeached for malconduct by the House of Representatives and tried by the Senate; and, if convicted, may be dismissed from office and disqualified for holding any other. This is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own Constitution in respect to our own judges.[1]

The want of a provision for removing the judges on account of inability has been a subject of complaint. But all considerate men will be sensible that such a provision would either not be practiced upon or would be more liable to abuse than calculated to answer any good purpose. The mensuration of the faculties of the mind has, I believe, no place in the catalogue of known arts. An attempt to fix the boundary between the regions of ability and inability would much oftener give scope to personal and party attachments and enmities than advance the interests of justice or the public good. The result, except in the case of insanity, must for the most part be arbitrary; and insanity, without any formal or express provision, may be safely pronounced to be a virtual disqualification.

The constitution of New York, to avoid investigations that must forever be vague and dangerous, has taken a particular age as the criterion of inability. No man can be a judge beyond sixty. I believe there are few at present who do not disapprove of this provision. There is no station in relation to which it is less proper than to that of a judge. The deliberating and comparing faculties generally preserve their strength much beyond that period in men who survive it; and when, in addition to this circumstance, we consider how few there are who

[1] Although the constitution made the tenure of office of judges dependent on good behavior, it provided no means of removal, save by impeachment. This omission resulted in the curious case of Judge Pickering, who was alleged to have become insane, and who was impeached in 1803. (See Adams's "History of the United States," ii. 155.) In Great Britain judges are removable by the crown on an address by both houses, and in Massachusetts they are removable by the governor and council, on petition of the legislature.—EDITOR.

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outlive the season of intellectual vigor, and how improbable it is that any considerable portion of the bench, whether more or less numerous, should be in such a situation at the same time, we shall be ready to conclude that limitations of this sort have little to recommend them. In a republic, where fortunes are not affluent and pensions not expedient, the dismission of men from stations in which they have served their country long and usefully, on which they depend for subsistence, and from which it will be too late to resort to any other occupation for a livelihood, ought to have some better apology to humanity than is to be found in the imaginary danger of a superannuated bench. PUBLIUS.

No. 80. (First collected edition, New York, 1788.) Hamilton.

EXTENT OF THE POWERS OF THE JUDICIAL DEPARTMENT.

To what cases the judicial authority ought to extend—To all cases which arise from duly enacted laws of the Union; which concern the execution of the provisions of the constitution; in which the United States is a party; which involve the peace of the Union in foreign relations, or when two states or a state and the citizens of another state, or the citizens of different states, are parties; which originate on high seas or are of admiralty jurisdiction; in which state tribunals cannot be supposed to be implicated—To what cases authority of judiciary will extend under proposed constitution—Statement of constitutional provisions—These provisions conform to what the powers of the judiciary ought to be—Propriety of delegating equity jurisdiction.

To the People of the State of New York:

To judge with accuracy of the proper extent of the federal judicature, it will be necessary to consider, in the first place, what are its proper objects.

It seems scarcely to admit of controversy that the judiciary authority of the Union ought to extend to these several descriptions of cases: 1st, to all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of

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legislation; 2d, to all those which concern the execution of the provisions expressly contained in the articles of Union; 3d, to all those in which the United States are a party; 4th, to all those which involve the PEACE of the CONFEDERACY, whether they relate to the intercourse between the United States and foreign nations, or to that between the States themselves; 5th, to all those which originate on the high seas, and are of admiralty or maritime jurisdiction; and lastly, to all those in which the State tribunals cannot be supposed to be impartial and unbiased.

The first point depends upon this obvious consideration, that there ought always to be a constitutional method of giving efficacy to constitutional provisions. What, for instance, would avail restrictions on the authority of the State legislatures, without some constitutional mode of enforcing the observance of them? The States, by the plan of the convention, are prohibited from doing a variety of things, some of which are incompatible with the interests of the Union, and others with the principles of good government. The imposition of duties on imported articles, and the emission of paper money, are specimens of each kind. No man of sense will believe that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them. This power must either be a direct negative on the State laws, or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of Union. There is no third course that I can imagine. The latter appears to have been thought by the convention preferable to the former, and, I presume, will be most agreeable to the States.

As to the second point, it is impossible by any argument or comment to make it clearer than it is in itself. If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative may be ranked among the number. The mere necessity of uniformity in the interpretation

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of the national laws decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.[1]

Still less need be said in regard to the third point. Controversies between the nation and its members or citizens can only be properly referred to the national tribunals. Any other plan would be contrary to reason, to precedent, and to decorum.

The fourth point rests on this plain proposition, that the peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members.[2] And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the

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[1] On April 3, 1788, Hamilton wrote to Madison:

"I have been very delinquent, my dear sir, in not thanking you for your letter from Philadelphia. The remarks you made on a certain subject are important, and will be attended to.

"There is truly much embarrassment in the case.

"I think, however, the principles we have talked of are not only just, but will apply to the other departments. Nor will the consequences appear so disagreeable as they may seem at first sight, when we attend to the true import of the rule established. The States *retain* all the authorities they were before possessed of, not alienated in the three modes pointed out; but this does not include cases which are the creatures of the new Constitution. For instance, the crime of treason against the United States *immediately* is a crime known only to the new Constitution. There of course *was* no power in the State constitutions to pardon that crime. There will therefore be none under the new, etc. This is something likely, it seems to me, to afford the best solution of the difficulty. I send you the *Federalist* from the beginning to the conclusion of the commentary on the Executive Branch. If our suspicions of the author be right, he must be too much engaged to make a rapid progress in what remains. The Court of Chancery and a Circuit Court are now sitting."—EDITOR.

[2] The reverse was asserted in the case of the Mafia riots at New Orleans, our government urging that it had no power to prevent or punish, because the riots were solely affairs of local jurisdiction; but it acknowledged responsibility for the neglect of duty by the municipal authorities, by making indemnities for the outrages. The same plea was made in the Wyoming Anti-Chinese riots.—EDITOR.

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federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith than to the security of the public tranquillity. A distinction may perhaps be imagined between cases arising upon treaties and the laws of nations and those which may stand merely on the footing of the municipal law. The former kind may be supposed proper for the federal jurisdiction, the latter for that of the States. But it is at least problematical whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations of a treaty or the general law of nations. And a still greater objection to the distinction would result from the immense difficulty, if not impossibility, of a practical discrimination between the cases of one complexion and those of the other. So great a proportion of the cases in which foreigners are parties involve national questions that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals.

The power of determining causes between two States, between one State and the citizens of another, and between the citizens of different States, is perhaps not less essential to the peace of the Union than that which has been just examined. History gives us a horrid picture of the dissensions and private wars which distracted and desolated Germany prior to the institution of the Imperial Chamber of Maximilian, towards the close of the fifteenth century; and informs us, at the same time, of the vast influence of that institution in appeasing the disorders and establishing the tranquillity of the empire. This was a court invested with authority to decide finally all differences among the members of the Germanic body.

A method of terminating territorial disputes between the States, under the authority of the federal head, was not unattended to, even in the imperfect system by which

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they have been hitherto held together.[1] But there are many other sources, besides interfering claims of boundary, from which bickerings and animosities may spring up among the members of the Union. To some of these we have been witnesses in the course of our past experience. It will readily be conjectured that I allude to the fraudulent laws which have been passed in too many of the States. And though the proposed Constitution establishes particular guards against the repetition of those instances which have heretofore made their appearance, yet it is warrantable to apprehend that the spirit which produced them will assume new shapes that could not be foreseen nor specifically provided against. Whatever practices may have a tendency to disturb the harmony between the States are proper objects of federal superintendence and control.

It may be esteemed the basis of the Union that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." And if it be a just principle that every government *ought to possess the means of executing its own provisions by its own authority*, it will follow that, in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.[2]

The fifth point will demand little animadversion. The

[1] See the "Predecessor of the Supreme Court," in Jameson's "Essays in the Constitutional History of the United States," 1889.—EDITOR.

[2] See the XIth Amendment.—EDITOR.

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most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizances of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace. The most important part of them are by the present Confederation submitted to federal jurisdiction.

The reasonableness of the agency of the national courts in cases in which the State tribunals cannot be supposed to be impartial speaks for itself. No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens. And it ought to have the same operation in regard to some cases between citizens of the same State. Claims to land under grants of different States, founded upon adverse pretensions of boundary, are of this description. The courts of neither of the granting States could be expected to be unbiased. The laws may have even prejudged the question, and tied the courts down to decisions in favor of the grants of the State to which they belonged. And even where this had not been done, it would be natural that the judges, as men, should feel a strong predilection to the claims of their own government.

Having thus laid down and discussed the principles which ought to regulate the constitution of the federal judiciary, we will proceed to test, by these principles, the particular powers of which, according to the plan of the convention, it is to be composed. It is to comprehend "all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a

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party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands and grants of different States; and between a State or the citizens thereof and foreign states, citizens, and subjects." This constitutes the entire mass of the judicial authority of the Union. Let us now review it in detail. It is, then, to extend:

First. To all cases in law and equity *arising under the Constitution* and *the laws of the United States.* This corresponds with the two first classes of causes which have been enumerated as proper for the jurisdiction of the United States. It has been asked, what is meant by "cases arising under the Constitution," in contradistinction from those "arising under the laws of the United States"? The difference has been already explained. All the restrictions upon the authority of the State legislatures furnish examples of it. They are not, for instance, to emit paper money; but the interdiction results from the Constitution, and will have no connection with any law of the United States. Should paper money, notwithstanding, be emitted, the controversies concerning it would be cases arising under the Constitution and not the laws of the United States, in the ordinary signification of the terms. This may serve as a sample of the whole.

It has also been asked, what need of the word "equity"? What equitable causes can grow out of the Constitution and laws of the United States? There is hardly a subject of litigation between individuals which may not involve those ingredients of *fraud, accident, trust,* or *hardship,* which would render the matter an object of equitable rather than of legal jurisdiction, as the distinction is known and established in several of the States. It is the peculiar province, for instance, of a court of equity to relieve against what are called hard bargains: these are contracts in which, though there may have been no direct fraud or deceit, sufficient to invalidate them in a court of law, yet there

See No. 83.

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may have been some undue and unconscionable advantage taken of the necessities or misfortunes of one of the parties, which a court of equity would not tolerate. In such cases, where foreigners were concerned on either side, it would be impossible for the federal judicatories to do justice without an equitable as well as a legal jurisdiction. Agreements to convey lands claimed under the grants of different States may afford another example of the necessity of an equitable jurisdiction in the federal courts. This reasoning may not be so palpable in those States where the formal and technical distinction between LAW and EQUITY is not maintained, as in this State, where it is exemplified by every day's practice.

The judiciary authority of the Union is to extend:

Second. To treaties made, or which shall be made, under the authority of the United States, and to all cases affecting ambassadors, other public ministers, and consuls. These belong to the fourth class of the enumerated cases, as they have an evident connection with the preservation of the national peace.

Third. To cases of admiralty and maritime jurisdiction. These form, altogether, the fifth of the enumerated classes of causes proper for the cognizance of the national courts.

Fourth. To controversies to which the United States shall be a party. These constitute the third of those classes.

Fifth. To controversies between two or more States; between a State and citizens of another State; between citizens of different States. These belong to the fourth of those classes, and partake, in some measure, of the nature of the last.

Sixth. To cases between the citizens of the same State *claiming lands under grants of different States.* These fall within the last class, and *are the only instances in which the proposed Constitution directly contemplates the cognizance of disputes between the citizens of the same State.*

Seventh. To cases between a State and the citizens thereof, and foreign States, citizens, or subjects. These

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have been already explained to belong to the fourth of the enumerated classes, and have been shown to be, in a peculiar manner, the proper subjects of the national judicature.

From this review of the particular powers of the federal judiciary as marked out in the Constitution, it appears that they are all conformable to the principles which ought to have governed the structure of that department, and which were necessary to the perfection of the system. If some partial inconveniences should appear to be connected with the incorporation of any of them into the plan, it ought to be recollected that the national legislature will have ample authority to make such *exceptions* and to prescribe such regulations as will be calculated to obviate or remove these inconveniences. The possibility of particular mischiefs can never be viewed by a well-informed mind as a solid objection to a general principle which is calculated to avoid general mischiefs and to obtain general advantages. PUBLIUS.

No. 81. (First collected edition, New York, 1788.) Hamilton.

DISTRIBUTION OF THE AUTHORITY OF THE JUDICIARY.

Propriety of establishing one court of final and supreme jurisdiction—Propriety of delegating judicial authority to a distinct department—Objections to this considered—This delegation of authority secures more completely the separation of the judiciary from the legislature, recognizes more fully the principle of good behavior as a tenure, secures greater legal ability, and removes the judiciary from party strife—The example of certain of the states—That no legislature can rectify judicial mistakes except as to future action, and the danger of encroachments by the judiciary on the legislature, considered—Propriety of constituting inferior courts—Relief to supreme court—State courts not fit for this—Advantage of dividing United States into judicial districts—Manner in which authority should be distributed—Original jurisdiction of supreme court—Original jurisdiction of inferior courts—Appellate jurisdiction of supreme court.

To the People of the State of New York:

Let us now return to the partition of the judiciary authority between different courts, and their relations to each other.

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"The judicial power of the United States is" (by the plan of the convention) "to be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish."*

That there ought to be one court of supreme and final jurisdiction is a proposition which is not likely to be contested. The reasons for it have been assigned in another place, and are too obvious to need repetition. The only question that seems to have been raised concerning it is, whether it ought to be a distinct body or a branch of the legislature. The same contradiction is observable in regard to this matter which has been remarked in several other cases. The very men who object to the Senate as a court of impeachments, on the ground of an improper intermixture of powers, advocate, by implication at least, the propriety of vesting the ultimate decision of all causes in the whole or in a part of the legislative body.

The arguments, or rather suggestions, upon which this charge is founded are to this effect: "The authority of the proposed Supreme Court of the United States, which is to be a separate and independent body, will be superior to that of the legislature. The power of construing the laws according to the *spirit* of the Constitution, will enable that court to mold them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body. This is as unprecedented as it is dangerous. In Britain the judicial power, in the last resort, resides in the House of Lords, which is a branch of the legislature; and this part of the British government has been imitated in the State constitutions in general. The Parliament of Great Britain and the legislatures of the several States can at any time rectify by law the exceptionable decisions of their respective courts. But the errors and usurpations of the Supreme Court of the United States will be uncontrollable and remediless."

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* Article 3, sec. 1.—PUBLIUS.

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This, upon examination, will be found to be made up altogether of false reasoning upon misconceived fact.

In the first place, there is not a syllable in the plan under consideration which *directly* empowers the national courts to construe the laws according to the spirit of the Constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every State. I admit, however, that the Constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition the laws ought to give place to the Constitution. But this doctrine is not deducible from any circumstance peculiar to the plan of the convention, but from the general theory of a limited Constitution; and, as far as it is true, is equally applicable to most, if not to all the State governments. There can be no objection, therefore, on this account, to the federal judicature which will not lie against the local judicatures in general, and which will not serve to condemn every constitution that attempts to set bounds to legislative discretion.

See No. 78.

But perhaps the force of the objection may be thought to consist in the particular organization of the Supreme Court; in its being composed of a distinct body of magistrates, instead of being one of the branches of the legislature, as in the government of Great Britain and that of this State. To insist upon this point, the authors of the objection must renounce the meaning they have labored to annex to the celebrated maxim requiring a separation of the departments of power. It shall, nevertheless, be conceded to them, agreeably to the interpretation given to that maxim in the course of these papers, that it is not violated by vesting the ultimate power of judging in a *part* of the legislative body. But though this be not an absolute violation of that excellent rule, yet it verges so nearly upon it, as on this account alone to be less eligible than the mode preferred by the convention. From a body which had even a partial agency in passing bad laws, we could rarely expect a disposition to temper and moderate them in the application. The

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same spirit which had operated in making them would be too apt in interpreting them; still less could it be expected that men who had infringed the Constitution in the character of legislators would be disposed to repair the breach in the character of judges. Nor is this all. Every reason which recommends the tenure of good behavior for judicial offices militates against placing the judiciary power, in the last resort, in a body composed of men chosen for a limited period. There is an absurdity in referring the determination of causes, in the first instance, to judges of permanent standing; in the last, to those of a temporary and mutable constitution. And there is a still greater absurdity in subjecting the decisions of men selected for their knowledge of the laws, acquired by long and laborious study, to the revision and control of men who, for want of the same advantage, cannot but be deficient in that knowledge. The members of the legislature will rarely be chosen with a view to those qualifications which fit men for the stations of judges; and as, on this account, there will be great reason to apprehend all the ill consequences of defective information, so, on account of the natural propensity of such bodies to party divisions, there will be no less reason to fear that the pestilential breath of faction may poison the fountains of justice. The habit of being continually marshaled on opposite sides will be too apt to stifle the voice both of law and of equity.[1]

These considerations teach us to applaud the wisdom of those States who have committed the judicial power, in the last resort, not to a part of the legislature, but to distinct and independent bodies of men. Contrary to the supposition of those who have represented the plan of the convention in this respect as novel and unprecedented, it is but a copy of the constitutions of New Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia; and the preference which has been given to those models is highly to be commended.

[1] The history of impeachment trials has proved this.—EDITOR.

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It is not true, in the second place, that the Parliament of Great Britain or the legislatures of the particular States can rectify the exceptionable decisions of their respective courts, in any other sense than might be done by a future legislature of the United States. The theory, neither of the British, nor the State constitutions, authorizes the revisal of a judicial sentence by a legislative act. Nor is there anything in the proposed Constitution, more than in either of them, by which it is forbidden. In the former, as well as in the latter, the impropriety of the thing, on the general principles of law and reason, is the sole obstacle. A legislature, without exceeding its province, cannot reverse a determination once made in a particular case; though it may prescribe a new rule for future cases. This is the principle, and it applies in all its consequences, exactly in the same manner and extent to the State governments as to the national government now under consideration. Not the least difference can be pointed out in any view of the subject.

It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty from the general nature of the judicial power, from the objects to which it relates, from the manner in which it is exercised, from its comparative weakness, and from its total incapacity to support its usurpations by force.[1] And the inference is greatly fortified by the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining

[1] In the Cherokee case President Jackson said of the Chief Justice, "John Marshall has pronounced his judgment; let him enforce it if he can."—EDITOR.

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upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security. There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption by degrading them from their stations. While this ought to remove all apprehensions on the subject, it affords at the same time a cogent argument for constituting the Senate a court for the trial of impeachments.

Having now examined, and, I trust, removed the objections to the distinct and independent organization of the Supreme Court, I proceed to consider the propriety of the power of constituting inferior courts,* and the relations which will subsist between these and the former.

The power of constituting inferior courts is evidently calculated to obviate the necessity of having recourse to the Supreme Court in every case of federal cognizance. It is intended to enable the national government to institute or *authorize*, in each State or district of the United States, a tribunal competent to the determination of matters of national jurisdiction within its limits.

But why, it is asked, might not the same purpose have been accomplished by the instrumentality of the State courts? This admits of different answers. Though the fitness and competency of those courts should be allowed in the utmost latitude, yet the substance of the power in question may still be regarded as a necessary part of the plan, if it were only to empower the national legislature to commit to them the cognizance of causes arising out of the national Constitution. To confer the power of

* This power has been absurdly represented as intended to abolish all the county courts in the several States, which are commonly called inferior courts. But the expressions of the Constitution are, to constitute "tribunals INFERIOR TO THE SUPREME COURT"; and the evident design of the provision is to enable the institution of local courts, subordinate to the Supreme, either in States or larger districts. It is ridiculous to imagine that county courts were in contemplation.—PUBLIUS.

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determining such causes upon the existing courts of the several States would perhaps be as much "to constitute tribunals" as to create new courts with the like power. But ought not a more direct and explicit provision to have been made in favor of the State courts? There are, in my opinion, substantial reasons against such a provision; the most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover that courts constituted like those of some of the States would be improper channels of the judicial authority of the Union. State judges, holding their offices during pleasure or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws. And if there was a necessity for confiding the original cognizance of causes arising under those laws to them, there would be a correspondent necessity for leaving the door of appeal as wide as possible. In proportion to the grounds of confidence in, or distrust of, the subordinate tribunals, ought to be the facility or difficulty of appeals. And well satisfied as I am of the propriety of the appellate jurisdiction, in the several classes of causes to which it is extended by the plan of the convention, I should consider everything calculated to give, in practice, an *unrestrained course* to appeals, as a source of public and private inconvenience.

I am not sure but that it will be found highly expedient and useful to divide the United States into four or five or half a dozen districts; and to institute a federal court in each district, in lieu of one in every State. The judges of these courts, with the aid of the State judges, may hold circuits for the trial of causes in the several parts of the respective districts. Justice through them may be administered with ease and dispatch, and appeals may be safely circumscribed within a narrow compass. This plan appears to me at present the most eligible of any that could be adopted; and in order to it, it is necessary that the power of constituting inferior courts

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should exist in the full extent in which it is to be found in the proposed Constitution.

These reasons seem sufficient to satisfy a candid mind that the want of such a power would have been a great defect in the plan. Let us now examine in what manner the judicial authority is to be distributed between the supreme and the inferior courts of the Union.

The Supreme Court is to be invested with original jurisdiction, only "in cases affecting ambassadors, other public ministers, and consuls, and those in which A STATE shall be a party." Public ministers of every class are the immediate representatives of their sovereigns. All questions in which they are concerned are so directly connected with the public peace that, as well for the preservation of this as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judicatory of the nation. Though consuls have not in strictness a diplomatic character, yet as they are the public agents of the nations to which they belong, the same observation is in a great measure applicable to them. In cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal.

Though it may rather be a digression from the immediate subject of this paper, I shall take occasion to mention here a supposition which has excited some alarm upon very mistaken grounds. It has been suggested that an assignment of the public securities of one State to the citizens of another would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation.

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.* This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a sur-

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render of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation and need not be repeated here. A recurrence to the principles there established will satisfy us that there is no color to pretend that the State governments would by the adoption of that plan be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident it could not be done without waging war against the contracting State; and to ascribe to the federal courts by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence would be altogether forced and unwarrantable.

Let us resume the train of our observations. We have seen that the original jurisdiction of the Supreme Court would be confined to two classes of causes, and those of a nature rarely to occur. In all other cases of federal cognizance, the original jurisdiction would appertain to the inferior tribunals; and the Supreme Court would have nothing more than an appellate jurisdiction, "with such *exceptions* and under such *regulations* as the Congress shall make."

The propriety of this appellate jurisdiction has been scarcely called in question in regard to matters of law; but the clamors have been loud against it as applied to matters of fact. Some well-intentioned men in this State, deriving their notions from the language and forms which obtain in our courts, have been induced to consider it as an implied supersedure of the trial by jury,

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in favor of the civil-law mode of trial which prevails in our courts of admiralty, probate, and chancery. A technical sense has been affixed to the term "appellate," which, in our law parlance, is commonly used in reference to appeals in the course of the civil law. But if I am not misinformed, the same meaning would not be given to it in any part of New England. There an appeal from one jury to another is familiar both in language and practice, and is even a matter of course, until there have been two verdicts on one side. The word "appellate," therefore, will not be understood in the same sense in New England as in New York, which shows the impropriety of a technical interpretation derived from the jurisprudence of any particular State. The expression, taken in the abstract, denotes nothing more than the power of one tribunal to review the proceedings of another, either as to the law or fact, or both. The mode of doing it may depend on ancient custom or legislative provision (in a new government it must depend on the latter), and may be with or without the aid of a jury, as may be judged advisable. If, therefore, the re-examination of a fact once determined by a jury should in any case be admitted under the proposed Constitution, it may be so regulated as to be done by a second jury, either by remanding the cause to the court below for a second trial of the fact, or by directing an issue immediately out of the Supreme Court.

But it does not follow that the re-examination of a fact once ascertained by a jury will be permitted in the Supreme Court. Why may not it be said, with the strictest propriety, when a writ of error is brought from an inferior to a superior court of law in this State, that the latter has jurisdiction of the fact as well as the law? It is true it cannot institute a new inquiry concerning the fact, but it takes cognizance of it as it appears upon the record, and pronounces the law arising upon it.* This is jurisdiction of both fact and law; nor is it even pos-

* This word is composed of JUS and DICTIO, *juris dictio*, or a speaking and pronouncing of the law.—PUBLIUS.

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sible to separate them. Though the common law courts of this State ascertain disputed facts by a jury, yet they unquestionably have jurisdiction of both fact and law; and accordingly, when the former is agreed in the pleadings, they have no recourse to a jury, but proceed at once to judgment. I contend, therefore, on this ground, that the expressions, "appellate jurisdiction, both as to law and fact," do not necessarily imply a re-examination in the Supreme Court of facts decided by juries in the inferior courts.

The following train of ideas may well be imagined to have influenced the convention, in relation to this particular provision. The appellate jurisdiction of the Supreme Court (it may have been argued) will extend to causes determinable in different modes, some in the course of the COMMON LAW, others in the course of the CIVIL LAW. In the former, the revision of the law only will be, generally speaking, the proper province of the Supreme Court; in the latter, the re-examination of the fact is agreeable to usage, and in some cases, of which prize causes are an example, might be essential to the preservation of the public peace. It is, therefore, necessary that the appellate jurisdiction should, in certain cases, extend in the broadest sense to matters of fact. It will not answer to make an express exception of cases which shall have been originally tried by a jury, because in the courts of some of the States *all causes* are tried in this mode*; and such an exception would preclude the revision of matters of fact, as well where it might be proper as where it might be improper. To avoid all inconveniences, it will be safest to declare generally that the Supreme Court shall possess appellate jurisdiction both as to law and *fact*, and that this jurisdiction shall be subject to such *exceptions* and regulations as the national legislature may prescribe. This will enable the govern-

* I hold that the States will have concurrent jurisdiction with the subordinate federal judicatories, in many cases of federal cognizance, as will be explained in my next paper.—PUBLIUS.

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ment to modify it in such a manner as will best answer the ends of public justice and security.

This view of the matter, at any rate, puts it out of all doubt that the supposed *abolition* of the trial by jury by the operation of this provision is fallacious and untrue. The legislature of the United States would certainly have full power to provide that in appeals to the Supreme Court there should be no re-examination of facts where they had been tried in the original causes by juries. This would certainly be an authorized exception; but if, for the reason already intimated, it should be thought too extensive, it might be qualified with a limitation to such causes only as are determinable at common law in that mode of trial.

The amount of the observations hitherto made on the authority of the judicial department is this: that it has been carefully restricted to those causes which are manifestly proper for the cognizance of the national judicature; that in the partition of this authority a very small portion of original jurisdiction has been preserved to the Supreme Court, and the rest consigned to the subordinate tribunals; that the Supreme Court will possess an appellate jurisdiction, both as to law and fact, in all the cases referred to them, both subject to any *exceptions* and *regulations* which may be thought advisable; that this appellate jurisdiction does, in no case, *abolish* the trial by jury; and that an ordinary degree of prudence and integrity in the national councils will insure us solid advantages from the establishment of the proposed judiciary, without exposing us to any of the inconveniences which have been predicted from that source.

PUBLIUS.

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No. 82. (First collected edition, New York, 1788.) **Hamilton.**

SOME MISCELLANEOUS QUESTIONS REGARDING THE JUDICIARY.

The jurisdiction of the state courts on federal questions—The state courts will retain all that is not exclusively delegated—Decision of causes arising from a particular regulation may be delegated by Congress exclusively to supreme court—Relation between state and federal courts when they have concurrent jurisdiction—An appeal will lie from state courts to the supreme court—The appellate jurisdiction of the inferior federal courts.

To the People of the State of New York:

The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties. 'Tis time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent WHOLE.

Such questions, accordingly, have arisen upon the plan proposed by the convention, and particularly concerning the judiciary department. The principal of these respect the situation of the State courts in regard to those causes which are to be submitted to federal jurisdiction. Is this to be exclusive, or are those courts to possess a concurrent jurisdiction? If the latter, in what relation will they stand to the national tribunals? These are inquiries which we meet with in the mouths of men of sense, and which are certainly entitled to attention.

The principles established in a former paper * teach us that the States will retain all *pre-existing* authorities which may not be exclusively delegated to the federal head; and that this exclusive delegation can only exist in one of

* No. XXXI.—PUBLIUS.

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three cases: where an exclusive authority is in express terms granted to the Union; or where a particular authority is granted to the Union, and the exercise of a like authority is prohibited to the States; or where an authority is granted to the Union, with which a similar authority in the States would be utterly incompatible. Though these principles may not apply with the same force to the judiciary as to the legislative power, yet I am inclined to think that they are, in the main, just with respect to the former, as well as the latter. And, under this impression, I shall lay it down as a rule that the State courts will *retain* the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes.

The only thing in the proposed Constitution which wears the appearance of confining the causes of federal cognizance to the federal courts is contained in this passage: "The JUDICIAL POWER of the United States *shall be vested* in one Supreme Court, and in *such* inferior courts as the Congress shall from time to time ordain and establish." This might either be construed to signify that the supreme and subordinate courts of the Union should alone have the power of deciding those causes to which their authority is to extend; or simply to denote that the organs of the national judiciary should be one Supreme Court, and as many subordinate courts as Congress should think proper to appoint; or, in other words, that the United States should exercise the judicial power with which they are to be invested, through one supreme tribunal, and a certain number of inferior ones, to be instituted by them. The first excludes, the last admits, the concurrent jurisdiction of the State tribunals; and as the first would amount to an alienation of State power by implication, the last appears to me the most natural and the most defensible construction.

But this doctrine of concurrent jurisdiction is only clearly applicable to those descriptions of causes of which the State courts have previous cognizance. It is not equally evident in relation to cases which may grow

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out of, and be *peculiar* to, the Constitution to be established; for not to allow the State courts a right of jurisdiction in such cases can hardly be considered as the abridgment of a pre-existing authority. I mean not therefore to contend that the United States, in the course of legislation upon the objects intrusted to their direction, may not commit the decision of causes arising upon a particular regulation to the federal courts solely, if such a measure should be deemed expedient; but I hold that the State courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of opinion that in every case in which they were not expressly excluded by the future acts of the national legislature, they will, of course, take cognizance of the causes to which those acts may give birth. This I infer from the nature of judiciary power, and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New York, may furnish the objects of legal discussion to our courts. When, in addition to this, we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited.

Here another question occurs: What relation would subsist between the national and State courts in these instances of concurrent jurisdiction? I answer that an appeal would certainly lie from the latter to the Supreme Court of the United States. The Constitution in direct terms gives an appellate jurisdiction to the Supreme Court in all the enumerated cases of federal cognizance in which it is not to have an original one, without a

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single expression to confine its operation to the inferior federal courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance, and from the reason of the thing, it ought to be construed to extend to the State tribunals. Either this must be the case, or the local courts must be excluded from a concurrent jurisdiction in matters of national concern; else the judiciary authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor. Neither of these consequences ought without evident necessity to be involved; the latter would be entirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government, and would essentially embarrass its measures. Nor do I perceive any foundation for such a supposition. Agreeably to the remark already made, the national and State systems are to be regarded as ONE WHOLE. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decisions. The evident aim of the plan of the convention is that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the courts of the Union. To confine, therefore, the general expressions giving appellate jurisdiction to the Supreme Court to appeals from the subordinate federal courts, instead of allowing their extension to the State courts, would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation.

But could an appeal be made to lie from the State courts to the subordinate federal judicatories? This is another of the questions which have been raised, and of greater difficulty than the former. The following considerations countenance the affirmative. The plan of the convention, in the first place, authorizes the national legislature "to constitute tribunals inferior to the Su-

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preme Court." * It declares, in the next place, that "the JUDICIAL POWER of the United States *shall be vested* in one Supreme Court, and in such inferior courts as Congress shall ordain and establish"; and it then proceeds to enumerate the cases to which this judicial power shall extend. It afterwards divides the jurisdiction of the Supreme Court into original and appellate, but gives no definition of that of the subordinate courts. The only outlines described for them are that they shall be "inferior to the Supreme Court," and that they shall not exceed the specified limits of the federal judiciary. Whether their authority shall be original or appellate, or both, is not declared. All this seems to be left to the discretion of the legislature. And this being the case, I perceive at present no impediment to the establishment of an appeal from the State courts to the subordinate national tribunals; and many advantages attending the power of doing it may be imagined. It would diminish the motives to the multiplication of federal courts, and would admit of arrangements calculated to contract the appellate jurisdiction of the Supreme Court. The State tribunals may then be left with a more entire charge of federal causes; and appeals, in most cases in which they may be deemed proper, instead of being carried to the Supreme Court may be made to lie from the State courts to district courts of the Union.

PUBLIUS.

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* Sec. 8th, art. 1st.—PUBLIUS.

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No. 83. (First collected edition, New York, 1788.) **Hamilton.**

TRIAL BY JURY IN RELATION TO THE NATIONAL JUDICIARY.

Objection that there is no provision in the proposed Constitution for trial by jury in civil cases, considered—True meaning of maxims on which this objection rests—Importance of right of trial by jury, considered—Criminal and civil cases—Jury system in different States—Difficulty of establishing a general rule—Impropriety of such a general rule in certain cases—The proposition of Massachusetts—The provisions of the New York constitution—The proposition that the jury system should be established in all cases whatever—Concluding remarks.

To the People of the State of New York:

The objection to the plan of the convention which has met with most success in this State, and perhaps in several of the other States, is *that relative to the want of a constitutional provision* for the trial by jury in civil cases.[1] The disingenuous form in which this objection is usually stated has been repeatedly adverted to and exposed, but continues to be pursued in all the conversations and writings of the opponents of the plan. The mere silence of the Constitution in regard to *civil causes* is represented as an abolition of the trial by jury, and the declamations to which it has afforded a pretext are artfully calculated to induce a persuasion that this pretended abolition is complete and universal, extending not only to every species of civil, but even to *criminal causes*. To argue with respect to the latter would, however, be as vain and fruitless as to attempt the serious proof of the *existence* of *matter*, or to demonstrate any of those propositions which, by their own internal evidence, force conviction, when expressed in language adapted to convey their meaning.

With regard to civil causes, subtleties almost too contemptible for refutation have been employed to countenance the surmise that a thing which is only *not provided for* is entirely *abolished*. Every man of discernment must at once perceive the wide difference between *silence* and *abolition*. But as the inventors of this fallacy have attempted to support it by certain *legal maxims* of interpretation, which they have perverted from their true meaning, it may not be wholly useless to explore the ground they have taken.

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[1] See VIth and VIIth amendments.—EDITOR.

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The maxims on which they rely are of this nature: "A specification of particulars is an exclusion of generals"; or, "The expression of one thing is the exclusion of another." Hence, say they, as the Constitution has established the trial by jury in criminal cases, and is silent in respect to civil, this silence is an implied prohibition of trial by jury in regard to the latter.

The rules of legal interpretations are rules of *common sense*, adopted by the courts in the construction of the laws. The true test, therefore, of a just application of them is its conformity to the source from which they are derived. This being the case, let me ask if it is consistent with common sense to suppose that a provision obliging the legislative power to commit the trial of criminal causes to juries, is a privation of its right to authorize or permit that mode of trial in other cases? Is it natural to suppose that a command to do one thing is a prohibition to the doing of another, which there was a previous power to do, and which is not incompatible with the thing commanded to be done? If such a supposition would be unnatural and unreasonable, it cannot be rational to maintain that an injunction of the trial by jury in certain cases is an interdiction of it in others.

A power to constitute courts is a power to prescribe the mode of trial; and consequently, if nothing was said in the Constitution on the subject of juries, the legislature would be at liberty either to adopt that institution or to let it alone. This discretion, in regard to criminal causes, is abridged by the express injunction of trial by jury in all such cases; but it is, of course, left at large in relation to civil causes, there being a total silence on this head. The specification of an obligation to try all criminal causes in a particular mode excludes indeed the obligation or necessity of employing the same mode in civil causes, but does not abridge *the power* of the legislature to exercise that mode if it should be thought proper. The pretense, therefore, that the national legislature would not be at full liberty to submit all the civil causes of federal cognizance to the determination of juries is a pretense destitute of all just foundation.

From these observations this conclusion results: that the trial by jury in civil cases would not be abolished; and that the use attempted to be made of the maxims which have been quoted is contrary to reason and common sense, and therefore not admissible. Even if these maxims had a precise technical sense, corresponding with the idea of those who employ them upon the present occasion, which, however, is not the case, they would still be inapplicable to a constitution of government. In relation to such a subject,

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the natural and obvious sense of its provisions, apart from any technical rules, is the true criterion of construction.

Having now seen that the maxims relied upon will not bear the use made of them, let us endeavor to ascertain their proper use and true meaning. This will be best done by examples. The plan of the convention declares that the power of Congress, or, in other words, of the *national legislature*, shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretension to a general legislative authority, because an affirmative grant of special powers would be absurd, as well as useless, if a general authority was intended.

In like manner the judicial authority of the federal judicatures is declared by the Constitution to comprehend certain cases particularly specified. The expression of those cases marks the precise limits beyond which the federal courts cannot extend their jurisdiction, because, the objects of their cognizance being enumerated, the specification would be nugatory if it did not exclude all ideas of more extensive authority.

These examples are sufficient to elucidate the maxims which have been mentioned, and to designate the manner in which they should be used.[1] [But that there may be no misapprehension upon this subject, I shall add one case more, to demonstrate the proper use of these maxims, and the abuse which has been made of them.

Let us suppose that by the laws of this State a married woman was incapable of conveying her estate, and that the legislature, considering this as an evil, should enact that she might dispose of her property by deed executed in the presence of a magistrate. In such a case there can be no doubt but the specification would amount to an exclusion of any other mode of conveyance, because the woman having no previous power to alienate her property, the specification determines the particular mode which she is, for that purpose, to avail herself of. But let us further suppose that in a subsequent part of the same act it should be declared that no woman should dispose of any estate of a determinate value without the consent of three of her nearest relations, signified by their signing the deed; could it be inferred from this regulation that a married woman might not procure the approbation of her relations to a deed for conveying property of inferior value? The position is too absurd to merit a refutation, and yet this is precisely the position which those must establish who contend that the trial by juries in civil

[1] The sentences which follow in brackets are omitted in the text of the editions of 1802 and 1818.—EDITOR.

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cases is abolished, because it is expressly provided for in cases of a criminal nature.]

From these observations it must appear unquestionably true that trial by jury is in no case abolished by the proposed Constitution, and it is equally true that, in those controversies between individuals in which the great body of the people are likely to be interested, that institution will remain precisely in the same situation in which it is placed by the State constitutions [and will be in no degree altered or influenced by the adoption of the plan under consideration].[1] The foundation of this assertion is, that the national judiciary will have no cognizance of them, and of course they will remain determinable as heretofore by the State courts only, and in the manner which the State constitutions and laws prescribe. All land causes, except where claims under the grants of different States come into question, and all other controversies between the citizens of the same State, unless where they depend upon positive violations of the articles of union, by acts of the State legislatures, will belong exclusively to the jurisdiction of the State tribunals. Add to this that admiralty causes, and almost all those which are of equity jurisdiction, are determinable under our own government without the intervention of a jury, and the inference from the whole will be that this institution, as it exists with us at present, cannot possibly be affected to any great extent by the proposed alteration in our system of government.

The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government. For my own part, the more the operation of the institution has fallen under my observation, the more reason I have discovered for holding it in high estimation; and it would be altogether superfluous to examine to what extent it deserves to be esteemed useful or essential in a representative republic, or how much more merit it may be entitled to as a defense against the oppressions of an hereditary monarch than as a barrier to the tyranny of popular magistrates in a popular government. Discussions of this kind would be more curious than beneficial,

[1] This clause in brackets is omitted in the revised text.—EDITOR.

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as all are satisfied of the utility of the institution and of its friendly aspect to liberty. But I must acknowlege that I cannot readily discern the inseparable connection between the existence of liberty and the trial by jury in civil cases. Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions, have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings.

See No. 84.

The trial by jury in criminal cases, aided by the *habeas corpus* act, seems therefore to be alone concerned in the question. And both of these are provided for, in the most ample manner, in the plan of the convention.

It has been observed that trial by jury is a safeguard against an oppressive exercise of the power of taxation. This observation deserves to be canvassed.

It is evident that it can have no influence upon the legislature in regard to the *amount* of taxes to be laid, to the *objects* upon which they are to be imposed, or to the *rule* by which they are to be apportioned. If it can have any influence, therefore, it must be upon the mode of collection and the conduct of the officers intrusted with the execution of the revenue laws.

As to the mode of collection in this State, under our own Constitution, the trial by jury is in most cases out of use. The taxes are usually levied by the more summary proceeding of distress and sale, as in cases of rent. And it is acknowledged on all hands that this is essential to the efficacy of the revenue laws. The dilatory course of a trial at law to recover the taxes imposed on individuals would neither suit the exigencies of the public nor promote the convenience of the citizens. It would often occasion an accumulation of costs more burdensome than the original sum of the tax to be levied.

And as to the conduct of the officers of the revenue, the provision in favor of trial by jury in criminal cases will afford the security aimed at. Willful abuses of a public authority to the oppression of the subject, and

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every species of official extortion, are offenses against the government, for which the persons who commit them may be indicted and punished according to the circumstances of the case.

The excellence of the trial by jury in civil cases appears to depend on circumstances foreign to the preservation of liberty. The strongest argument in its favor is that it is a security against corruption. As there is always more time and better opportunity to tamper with a standing body of magistrates than with a jury summoned for the occasion, there is room to suppose that a corrupt influence would more easily find its way to the former than to the latter. The force of this consideration is, however, diminished by others. The sheriff, who is the summoner of ordinary juries, and the clerks of courts, who have the nomination of special juries, are themselves standing officers, and, acting individually, may be supposed more accessible to the touch of corruption than the judges, who are a collective body. It is not difficult to see that it would be in the power of those officers to select jurors who would serve the purpose of the party as well as a corrupted bench. In the next place, it may fairly be supposed that there would be less difficulty in gaining some of the jurors promiscuously taken from the public mass, than in gaining men who had been chosen by the government for their probity and good character. But making every deduction for these considerations, the trial by jury must still be a valuable check upon corruption. It greatly multiplies the impediments to its success. As matters now stand, it would be necessary to corrupt both court and jury; for where the jury have gone evidently wrong, the court will generally grant a new trial, and it would be in most cases of little use to practice upon the jury, unless the court could be likewise gained. Here then is a double security, and it will readily be perceived that this complicated agency tends to preserve the purity of both institutions. By increasing the obstacles to success, it discourages attempts to seduce the integrity of either. The temptations to prostitution

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which the judges might have to surmount must certainly be much fewer, while the co-operation of a jury is necessary, than they might be if they had themselves the exclusive determination of all causes.[1]

Notwithstanding, therefore, the doubts I have expressed as to the essentiality of trial by jury in civil cases to liberty, I admit that it is in most cases, under proper regulations, an excellent method of determining questions of property; and that on this account alone it would be entitled to a constitutional provision in its favor if it were possible to fix the limits within which it ought to be comprehended. There is, however, in all cases, great difficulty in this; and men not blinded by enthusiasm must be sensible that in a federal government, which is a composition of societies whose ideas and institutions in relation to the matter materially vary from each other, that difficulty must be not a little augmented. For my own part, at every new view I take of the subject, I become more convinced of the reality of the obstacles which, we are authoritatively informed, prevented the insertion of a provision on this head in the plan of the convention.

The great difference between the limits of the jury trial in different States is not generally understood; and as it must have considerable influence on the sentence we ought to pass upon the omission complained of in regard to this point, an explanation of it is necessary. In this State our judicial establishments resemble, more nearly than in any other, those of Great Britain. We have courts of common law, courts of probates (analogous in certain matters to the spiritual courts in England), a court of admiralty, and a court of chancery. In the courts of common law only the trial by jury prevails, and this with some exceptions. In all the others a single judge presides, and proceeds in general either according to the course of the canon or civil law, with ut the aid of a jury.* In New Jersey there is a court of chancery which

* It has been erroneously insinuated, with regard to the court of chancery, that this court generally tries disputed facts by a jury. The truth is that references to a jury in that court rarely happen, and are in no case necessary but where the validity of a devise of land comes into question.—PUBLIUS.

[1] When the United States marshals, toward the end of the Federalist

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proceeds like ours, but neither courts of admiralty nor of probates, in the sense in which these last are established with us. In that State the courts of common law have the cognizance of those causes which with us are determinable in the courts of admiralty and of probates, and of course the jury trial is more extensive in New Jersey than in New York. In Pennsylvania, this is perhaps still more the case, for there is no court of chancery in that State and its common-law courts have equity jurisdiction. It has a court of admiralty, but none of probates, at least on the plan of ours. Delaware has in these respects imitated Pennsylvania. Maryland approaches more nearly to New York, as does also Virginia, except that the latter has a plurality of chancellors. North Carolina bears most affinity to Pennsylvania; South Carolina to Virginia. I believe, however, that in some of those States which have distinct courts of admiralty, the causes depending in them are triable by juries. In Georgia there are none but common-law courts, and an appeal of course lies from the verdict of one jury to another, which is called a special jury, and for which a particular mode of appointment is marked out. In Connecticut they have no distinct courts either of chancery or of admiralty, and their courts of probates have no jurisdiction of causes. Their common-law courts have admiralty and, to a certain extent, equity jurisdiction. In cases of importance their general assembly is the only court of chancery. In Connecticut, therefore, the trial by jury extends in *practice* further than in any other State yet mentioned. Rhode Island is, I believe, in this particular, pretty much in the situation of Connecticut. Massachusetts and New Hampshire, in regard to the blending of law, equity, and admiralty jurisdictions, are in a similar predicament. In the four Eastern States the trial by jury not only stands upon a broader foundation than in the other States, but it is attended with a peculiarity unknown, in its full extent, to any of them. There is an appeal *of course* from one jury to another, till there have been two verdicts out of three on one side.

From this sketch it appears that there is a material diversity, as well in the modification as in the extent of the institution of trial by jury in civil cases, in the several States; and from this fact these obvious reflections flow: first, that no general rule could have been fixed upon by the convention which would have corresponded with the circumstances of all the States; and secondly,

régime, packed the juries to secure partisan verdicts, Jefferson drafted a scheme for the election of jurors by popular vote. See "Writings of Jefferson" (Ford's edition), vii. 285.—EDITOR.

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that more or at least as much might have been hazarded by taking the system of any one State for a standard, as by omitting a provision altogether and leaving the matter, as has been done, to legislative regulation.

The propositions which have been made for supplying the omission have rather served to illustrate than to obviate the difficulty of the thing. The minority of Pennsylvania have proposed this mode of expression for the purpose—"Trial by jury shall be as heretofore"—and this I maintain would be senseless and nugatory. The United States, in their united or collective capacity, are the OBJECT to which all general provisions in the Constitution must necessarily be construed to refer. Now it is evident that though trial by jury, with various limitations, is known in each State individually, yet in the United States, *as such*, it is at this time altogether unknown, because the present federal government has no judiciary power whatever; and consequently there is no proper antecedent or previous establishment to which the term *heretofore* could relate. It would therefore be destitute of a precise meaning, and inoperative from its uncertainty.

As, on the one hand, the form of the provision would not fulfill the intent of its proposers, so, on the other, if I apprehend that intent rightly, it would be in itself inexpedient. I presume it to be, that causes in the federal courts should be tried by jury, if, in the State where the courts sat, that mode of trial would obtain in a similar case in the State courts: that is to say, admiralty causes should be tried in Connecticut by a jury, in New York without one. The capricious operation of so dissimilar a method of trial in the same cases, under the same government, is of itself sufficient to indispose every well-regulated judgment toward it. Whether the cause should be tried with or without a jury, would depend, in a great number of cases, on the accidental situation of the court and parties.

But this is not, in my estimation, the greatest objection. I feel a deep and deliberate conviction that there are many cases in which the trial by jury is an ineligible one. I think it so particularly in cases which concern the public peace with foreign nations—that is, in most cases where the question turns wholly on the laws of nations. Of this nature, among others, are all prize causes. Juries cannot be supposed competent to investigations that require a thorough knowledge of the laws and usages of nations; and they will sometimes be

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under the influence of impressions which will not suffer them to pay sufficient regard to those considerations of public policy which ought to guide their inquiries. There would of course be always danger that the rights of other nations might be infringed by their decisions, so as to afford occasions of reprisal and war. Though the proper province of juries be to determine matters of fact, yet in most cases legal consequences are complicated with fact in such a manner as to render a separation impracticable.

It will add great weight to this remark, in relation to prize causes, to mention that the method of determining them has been thought worthy of particular regulation in various treaties between different powers of Europe, and that, pursuant to such treaties, they are determinable in Great Britain, in the last resort, before the king himself in his privy council, where the fact, as well as the law, undergoes a re-examination. This alone demonstrates the impolicy of inserting a fundamental provision in the Constitution which would make the State systems a standard for the national government in the article under consideration, and the danger of encumbering the government with any constitutional provisions the propriety of which is not indisputable.

My convictions are equally strong that great advantages result from the separation of the equity from the law jurisdiction, and that the causes which belong to the former would be improperly committed to juries. The great and primary use of a court of equity[1] is to give relief *in extraordinary cases*, which are *exceptions** to general rules. To unite the jurisdiction of such cases with the ordinary jurisdiction must have a tendency to unsettle the general rules, and to subject every case that arises to a *special* determination;

See No. 80.

* It is true that the principles by which that relief is governed are now reduced to a regular system; but it is not the less true that they are in the main applicable to SPECIAL circumstances, which form exceptions to general rules.—PUBLIUS.

[1] See "Writings of Jefferson" (Ford's edition), iv. 109, for an account of the origin of equity courts.—EDITOR.

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while a separation of the one from the other has the contrary effect of rendering one a sentinel over the other, and of keeping each within the expedient limits. Besides this, the circumstances that constitute cases proper for courts of equity are in many instances so nice and intricate that they are incompatible with the genius of trials by jury. They require often such long, deliberate, and critical investigation as would be impracticable to men called from their occupations and obliged to decide before they were permitted to return to them. The simplicity and expedition which form the distinguishing characters of this mode of trial require that the matter to be decided should be reduced to some single and obvious point; while the litigations usual in chancery frequently comprehend a long train of minute and independent particulars.

It is true that the separation of the equity from the legal jurisdiction is peculiar to the English system of jurisprudence, which is the model that has been followed in several of the States. But it is equally true that the trial by jury has been unknown in every case in which they have been united. And the separation is essential to the preservation of that institution in its pristine purity. The nature of a court of equity will readily permit the extension of its jurisdiction to matters of law; but it is not a little to be suspected that the attempt to extend the jurisdiction of the courts of law to matters of equity will not only be unproductive of the advantages which may be derived from courts of chancery on the plan upon which they are established in this State, but will tend gradually to change the nature of the courts of law, and to undermine the trial by jury, by introducing questions too complicated for a decision in that mode.

These appeared to be conclusive reasons against incorporating the systems of all the States, in the formation of the national judiciary, according to what may be conjectured to have been the attempt of the Pennsylvania minority. Let us now examine how far the proposition of Massachusetts is calculated to remedy the supposed defect.

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It is in this form: "In civil actions between citizens of different States, every issue of fact, arising in *actions at common law*, may be tried by a jury if the parties, or either of them, request it."[1]

This, at best, is a proposition confined to one description of causes; and the inference is fair, either that the Massachusetts convention considered that as the only class of federal causes in which the trial by jury would be proper; or that, if desirous of a more extensive provision, they found it impracticable to devise one which would properly answer the end. If the first, the omission of a regulation respecting so partial an object can never be considered as a material imperfection in the system. If the last, it affords a strong corroboration of the extreme difficulty of the thing.

But this is not all: if we advert to the observations already made respecting the courts that subsist in the several States of the Union and the different powers exercised by them, it will appear that there are no expressions more vague and indeterminate than those which have been employed to characterize *that* species of causes which it is intended shall be entitled to a trial by jury. In this State the boundaries between actions at common law and actions of equitable jurisdiction are ascertained in conformity to the rules which prevail in England upon that subject. In many of the other States the boundaries are less precise. In some of them every cause is to be tried in a court of common law, and upon that foundation every action may be considered as an action at common law, to be determined by a jury, if the parties, or either of them, choose it. Hence, the same irregularity and confusion would be introduced by a compliance with this proposition that I have already noticed as resulting from the regulation proposed by the Pennsylvania minority. In one State a cause would receive its determination from a jury, if the parties, or either of them, requested it; but in another State, a cause exactly similar to the other must be decided without the intervention of a jury, because the State judicatories varied as to common-law jurisdiction.

It is obvious, therefore, that the Massachusetts proposition upon this subject cannot operate as a general regulation, until some uniform plan with respect to the limits of common law and equitable jurisdictions shall be adopted by the different States. To devise a plan of that kind is a task arduous in itself, and which it would require much time and reflection to mature. It would be extremely difficult, if not impossible, to suggest any general regulation that would be acceptable to all the States in the Union, or that would perfectly quadrate with the several State institutions.

[1] See Appendix p. 632—EDITOR.

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It may be asked, Why could not a reference have been made to the Constitution of this State, taking that, which is allowed by me to be a good one, as a standard for the United States? I answer that it is not very probable the other States would entertain the same opinion of our institutions as we do ourselves. It is natural to suppose that they are hitherto more attached to their own, and that each would struggle for the preference. If the plan of taking one State as a model for the whole had been thought of in the convention, it is to be presumed that the adoption of it in that body would have been rendered difficult by the predilection of each representation in favor of its own government; and it must be uncertain which of the States would have been taken as the model. It has been shown that many of them would be improper ones. And I leave it to conjecture whether, under all circumstances, it is most likely that New York, or some other State, would have been preferred. But admit that a judicious selection could have been effected in the convention; still there would have been great danger of jealousy and disgust in the other States at the partiality which had been shown to the institutions of one. The enemies of the plan would have been furnished with a fine pretext for raising a host of local prejudices against it, which perhaps might have hazarded, in no inconsiderable degree, its final establishment.

To avoid the embarrassments of a definition of the cases which the trial by jury ought to embrace, it is sometimes suggested by men of enthusiastic tempers that a provision might have been inserted for establishing it in all cases whatsoever. For this, I believe, no precedent is to be found in any member of the Union; and the considerations which have been stated in discussing the proposition of the minority of Pennsylvania must satisfy every sober mind that the establishment of the trial by jury in *all* cases would have been an unpardonable error in the plan.

In short, the more it is considered the more arduous will appear the task of fashioning a provision in such a form as not to express too little to answer the purpose, or too much to be advisable; or which might not have opened other sources of opposition to the great and essential object of introducing a firm national government.

I cannot but persuade myself, on the other hand, that the different lights in which the subject has been placed

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in the course of these observations, will go far toward removing in candid minds the apprehensions they may have entertained on the point. They have tended to show that the security of liberty is materially concerned only in the trial by jury in criminal cases, which is provided for in the most ample manner in the plan of the convention; that even in far the greatest proportion of civil cases, and those in which the great body of the community is interested, that mode of trial will remain in its full force, as established in the State constitutions, untouched and unaffected by the plan of the convention; that it is in no case abolished * by that plan; and that there are great if not insurmountable difficulties in the way of making any precise and proper provision for it in a Constitution for the United States.

The best judges of the matter will be the least anxious for a constitutional establishment of the trial by jury in civil cases, and will be the most ready to admit that the changes which are continually happening in the affairs of society may render a different mode of determining questions of property preferable in many cases in which that mode of trial now prevails. For my part, I acknowledge myself to be convinced that even in this State it might be advantageously extended to some cases to which it does not at present apply, and might as advantageously be abridged in others. It is conceded by all reasonable men that it ought not to obtain in all cases. The examples of innovations which contract its ancient limits, as well in these States as in Great Britain, afford a strong presumption that its former extent has been found inconvenient, and give room to suppose that future experience may discover the propriety and utility of other exceptions. I suspect it to be impossible in the nature of the thing to fix the salutary point at which the operation of the institution ought to stop, and this is with me a strong argument for leaving the matter to the discretion of the legislature.

* *Vide* No. LXXXI., in which the supposition of its being abolished by the appellate jurisdiction in matters of fact being vested in the Supreme Court, is examined and refuted.—PUBLIUS.

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This is now clearly understood to be the case in Great Britain, and it is equally so in the State of Connecticut; and yet it may be safely affirmed that more numerous encroachments have been made upon the trial by jury in this State since the Revolution, though provided for by a positive article of our constitution, than has happened in the same time either in Connecticut or Great Britain. It may be added that these encroachments have generally originated with the men who endeavor to persuade the people they are the warmest defenders of popular liberty, but who have rarely suffered constitutional obstacles to arrest them in a favorite career. The truth is that the general GENIUS of a government is all that can be substantially relied upon for permanent effects. Particular provisions, though not altogether useless, have far less virtue and efficacy than are commonly ascribed to them; and the want of them will never be, with men of sound discernment, a decisive objection to any plan which exhibits the leading characters of a good government.

It certainly sounds not a little harsh and extraordinary to affirm that there is no security for liberty in a Constitution which expressly establishes the trial by jury in criminal cases because it does not do it in civil also; while it is a notorious fact that Connecticut, which has been always regarded as the most popular State in the Union, can boast of no constitutional provision for either. PUBLIUS.

No. 84. (First collected edition, New York, 1788.) **Hamilton.**

LACK OF A BILL OF RIGHTS.

Bill of rights—Liberty of the press—Seat of government too remote—More provision for debts due to the United States—Additional expenses of new system—Concluding remarks.

To the People of the State of New York:

In the course of the foregoing review of the Constitution I have taken notice of, and endeavored to answer most of the objections which have appeared against it.

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There, however, remain a few which either did not fall naturally under any particular head or were forgotten in their proper places. These shall now be discussed; but as the subject has been drawn into great length, I shall so far consult brevity as to comprise all my observations on these miscellaneous points in a single paper.

The most considerable of the remaining objections is that the plan of the convention contains no bill of rights. Among other answers given to this, it has been upon different occasions remarked that the constitutions of several of the States are in a similar predicament. I add that New York is of the number. And yet the opposers of the new system in this State, who profess an unlimited admiration for its constitution, are among the most intemperate partisans of a bill of rights. To justify their zeal in this matter they allege two things: one is that, though the constitution of New York has no bill of rights prefixed to it, yet it contains in the body of it various provisions in favor of particular privileges and rights, which in substance amount to the same thing; the other is that the Constitution adopts in their full extent the common and statute law of Great Britain, by which many other rights, not expressed in it, are equally secured.

To the first I answer that the Constitution proposed by the convention contains, as well as the constitution of this State, a number of such provisions.

Independent of those which relate to the structure of the government, we find the following: Article 1, section 3, clause 7—"Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law." Section 9 of the same article, clause 2—"The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Clause 3—"No bill of attainder or *ex post facto* law shall be passed." Clause 7—"No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present,

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emolument, office, or title of any kind whatever, from any king, prince, or foreign state." Article 3, section 2, clause 3—"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed." Section 3, of the same article—"Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court." And clause 3 of the same section —"The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted."

It may well be a question whether these are not, upon the whole, of equal importance with any which are to be found in the constitution of this State. The establishment of the writ of *habeas corpus*, the prohibition of *ex post facto* laws, and of TITLES OF NOBILITY, *to which we have no corresponding provision in our constitution*, are perhaps greater securities to liberty and republicanism than any it contains. The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been in all ages the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone,* in reference to the latter, are well worthy of recital: "To bereave a man of life [says he], or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore *a more dangerous engine* of arbitrary government." And as a remedy for this fatal evil he is every-

See No. 83.

* *Vide* Blackstone's "Commentaries," vol. i. p. 136.—PUBLIUS.

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where peculiarly emphatical in his encomiums on the *habeas corpus* act,[1] which in one place he calls "the BULWARK of the British Constitution." *

Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the corner stone of republican government; for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people.

To the second—that is, to the pretended establishment of the common and statute law by the Constitution—I answer that they are expressly made subject "to such alterations and provisions as the legislature shall from time to time make concerning the same." They are, therefore, at any moment liable to repeal by the ordinary legislative power, and of course have no constitutional sanction. The only use of the declaration was to recognize the ancient law, and to remove doubts which might have been occasioned by the Revolution. This consequently can be considered as no part of a declaration of rights, which under our constitutions must be intended as limitations of the power of the government itself.

It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of

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* *Vide* Blackstone's "Commentaries," vol. iv. p. 438.—PUBLIUS.

[1] In connection with the Burr plot Jefferson endeavored to have the right of Habeas Corpus suspended, but, to avoid the responsibility for what might prove unpopular, he sought to have it done by act of Congress. The Senate passed a bill for the purpose, but the more popular House refused, by an overwhelming majority, to concur. In 1862 Lincoln faced the difficulty, without any attempt at indirection, by suspending the right of Habeas Corpus by proclamation. This led to a warm discussion of the power of the Executive in this matter, the ablest arguments being Binney's "Privileges of the Writ of Habeas Corpus under the Constitution," Philadelphia, 1862; Nicholas's "Habeas Corpus," Louisville, 1862; Montgomery's "Writ of Habeas Corpus," Philadelphia, 1862; Parker's "Habeas Corpus and Martial Law" Philadelphia, 1862; "The Suspending Power and The Writ of Habeas Corpus," Philadelphia, 1862; and Whiting's "Military Arrests in Time of War," Washington, 1863. Lincoln's own view is given in his reply to a Committee of Albany Democrats, June 12, 1863, first printed in "Is the President of the United States violating the Constitution in making Arrests?"—EDITOR.

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privilege, reservations of rights not surrendered to the prince. Such was MAGNA CHARTA, obtained by the barons, sword in hand, from King John. Such were the subsequent confirmations of that charter by succeeding princes. Such was the *Petition of Right* assented to by Charles I., in the beginning of his reign. Such, also, was the Declaration of Right presented by the Lords and Commons to the Prince of Orange in 1688, and afterward thrown into the form of an act of parliament called the Bill of Rights. It is evident, therefore, that, according to their primitive signification, they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and, as they retain everything, they have no need of particular reservations. "WE, THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do *ordain* and *establish* this Constitution for the United States of America." Here is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government.

But a minute detail of particular rights is certainly far less applicable to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to a Constitution which has the regulation of every species of personal and private concerns. If, therefore, the loud clamors against the plan of the convention, on this score, are well founded, no epithets of reprobation will be too strong for the constitution of this State. But the truth is that both of them contain all which, in relation to their objects, is reasonably to be desired.

I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various

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exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?[1] I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge with a semblance of reason that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication that a power to prescribe proper regulations concerning it was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights.

On the subject of the liberty of the press, as much as has been said, I cannot forbear adding a remark or two: in the first place, I observe that there is not a syllable concerning it in the constitution of this State; in the next, I contend that whatever has been said about it in that of any other State amounts to nothing. What signifies a declaration that "the liberty of the press shall be inviolably preserved"? What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer that its security,

[1] Although the first amendment added a distinct guaranty to this contention that no power to interfere with the liberty of the press was contained in the national constitution, the sedition law was placed upon the statute book within ten years. Hamilton's letter to Dayton ("Works," iv. 387) shows that he considered this law both "constitutional and politic." The military suppression of certain papers during the Civil War indicates of how little account constitutional guaranties are in moments of necessity.—EDITOR.

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whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government.* And here, after all, as is intimated upon another occasion, must we seek for the only solid basis of all our rights.

There remains but one other view of this matter to conclude the point. The truth is, after all the declamations we have heard, that the Constitution is itself in every rational sense, and to every useful purpose, A BILL OF RIGHTS. The several bills of rights in Great Britain form its constitution, and conversely the constitution of each State is its bill of rights. And the proposed Constitution, if adopted, will be the bill of rights of the Union. Is it one object of a bill of rights to declare and specify the political privileges of the citizens in the structure and administration of the government? This is done in the most ample and precise manner in the plan of the convention; comprehending various precautions for the public security which are not to be found in any of the State constitutions. Is another object of a bill of rights to define certain immunities and modes of proceeding, which are relative to personal and private concerns?

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*To show that there is a power in the Constitution by which the liberty of the press may be affected, recourse has been had to the power of taxation. It is said that duties may be laid upon the publications so high as to amount to a prohibition. I know not by what logic it could be maintained that the declarations in the State constitutions in favor of the freedom of the press would be a constitutional impediment to the imposition of duties upon publications by the State legislatures. It cannot certainly be pretended that any degree of duties, however low, would be an abridgment of the liberty of the press. We know that newspapers are taxed in Great Britain, and yet it is notorious that the press nowhere enjoys greater liberty than in that country. And if duties of any kind may be laid without a violation of that liberty, it is evident that the extent must depend on legislative discretion regulated by public opinion; so that, after all, general declarations respecting the liberty of the press will give it no greater security than it will have without them. The same invasions of it may be effected under the State constitutions which contain those declarations through the means of taxation, as under the proposed Constitution, which has nothing of the kind. It would be quite as significant to declare that government ought to be free, that taxes ought not to be excessive, etc., as that the liberty of the press ought not to be restrained.—PUBLIUS.

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This we have seen has also been attended to, in a variety of cases, in the same plan. Adverting, therefore, to the substantial meaning of a bill of rights, it is absurd to allege that it is not to be found in the work of the convention. It may be said that it does not go far enough, though it will not be easy to make this appear; but it can with no propriety be contended that there is no such thing. It certainly must be immaterial what mode is observed as to the order of declaring the rights of the citizens, if they are to be found in any part of the instrument which establishes the government. And hence it must be apparent that much of what has been said on this subject rests merely on verbal and nominal distinctions, entirely foreign from the substance of the thing.

Another objection which has been made, and which, from the frequency of its repetition, it is to be presumed is relied on, is of this nature: "It is improper [say the objectors] to confer such large powers as are proposed upon the national government, because the seat of that government must of necessity be too remote from many of the States to admit of a proper knowledge on the part of the constituent of the conduct of the representative body." This argument, if it proves anything, proves that there ought to be no general government whatever. For the powers which, it seems to be agreed on all hands, ought to be vested in the Union cannot safely be intrusted to a body which is not under every requisite control. But there are satisfactory reasons to show that the objection is in reality not well founded. There is in most of the arguments which relate to distance a palpable illusion of the imagination. What are the sources of information by which the people in Montgomery county must regulate their judgment of the conduct of their representatives in the State legislature? Of personal observation they can have no benefit. This is confined to the citizens on the spot. They must therefore depend on the information of intelligent men, in whom they confide; and how must these men obtain their information? Evidently from the complexion of public measures, from the public prints, from correspondences with their representatives, and with other persons who reside at the place of their deliberations. This does not apply to Montgomery county only, but to all the counties at any considerable distance from the seat of government.

It is equally evident that the same sources of information would be open to the people in relation to the conduct of their repre-

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sentatives in the general government, and the impediments to a prompt communication which distance may be supposed to create will be overbalanced by the effects of the vigilance of the State governments. The executive and legislative bodies of each State will be so many sentinels over the persons employed in every department of the national administration; and as it will be in their power to adopt and pursue a regular and effectual system of intelligence, they can never be at a loss to know the behavior of those who represent their constituents in the national councils, and can readily communicate the same knowledge to the people. Their disposition to apprise the community of whatever may prejudice its interests from another quarter may be relied upon, if it were only from the rivalship of power. And we may conclude with the fullest assurance that the people, through that channel, will be better informed of the conduct of their national representatives than they can be by any means they now possess of that of their State representatives.

It ought also to be remembered that the citizens who inhabit the country at and near the seat of government will, in all questions that affect the general liberty and prosperity, have the same interest with those who are at a distance, and that they will stand ready to sound the alarm when necessary, and to point out the actors in any pernicious project. The public papers will be expeditious messengers of intelligence to the most remote inhabitants of the Union.

Among the many curious objections which have appeared against the proposed Constitution, the most extraordinary and the least colorable is derived from the want of some provision respecting the debts due *to* the United States. This has been represented as a tacit relinquishment of those debts and as a wicked contrivance to screen public defaulters. The newspapers have teemed with the most inflammatory railings on this head; yet there is nothing clearer than that the suggestion is entirely void of foundation, the offspring of extreme ignorance or extreme dishonesty. In addition to the remarks I have made upon the subject in another place, I shall only observe that as it is a plain dictate of common sense, so it is also an established doctrine of political law, that "*States neither lose any of their rights, nor are discharged from any of their obligations, by a change in the form of their civil government.*" *

* *Vide* Rutherforth's "Institutes," vol. ii. book II. chap. x. sect. xiv. and xv. *Vide* also Grotius, book II. chap. ix. sect. viii. and ix.—PUBLIUS.

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The last objection of any consequence which I at present recollect turns upon the article of expense. If it were even true that the adoption of the proposed government would occasion a considerable increase of expense, it would be an objection that ought to have no weight against the plan.

See No. 13.

The great bulk of the citizens of America are with reason convinced that Union is the basis of their political happiness. Men of sense of all parties now, with few exceptions, agree that it cannot be preserved under the present system, nor without radical alterations; that new and extensive powers ought to be granted to the national head, and that these require a different organization of the federal government—a single body being an unsafe depositary of such ample authorities. In conceding all this, the question of expense must be given up; for it is impossible, with any degree of safety, to narrow the foundation upon which the system is to stand. The two branches of the legislature are, in the first instance, to consist of only sixty-five persons, which is the same number of which Congress, under the existing Confederation, may be composed. It is true that this number is intended to be increased, but this is to keep pace with the progress of the population and resources of the country. It is evident that a less number would, even in the first instance, have been unsafe, and that a continuance of the present number would, in a more advanced stage of population, be a very inadequate representation of the people.

Whence is the dreaded augmentation of expense to spring? One source indicated is the multiplication of offices under the new government. Let us examine this a little.

It is evident that the principal departments of the administration under the present government are the same which will be required under the new. There are now a Secretary of War, a Secretary of Foreign Affairs, a Secretary for Domestic Affairs, a Board of Treasury, consisting of three persons, a Treasurer, assistants, clerks, etc. These officers are indispensable under any system, and will suffice under the new as well as the old. As to ambassadors and other ministers and agents in foreign countries, the proposed Constitution can make no other difference than to render their characters, where they reside, more respectable, and their services more useful. As to persons to be employed in the collection of the revenues, it is unquestionably true that these will form a very considerable addition to the number of federal officers; but it will not follow that this will occasion an increase of public

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expense. It will be in most cases nothing more than an exchange of State for national officers. In the collection of all duties, for instance, the persons employed will be wholly of the latter description. The States individually will stand in no need of any for this purpose. What difference can it make, in point of expense, to pay officers of the customs appointed by the State or by the United States? [There is no good reason to suppose that either the number or the salaries of the latter will be greater than those of the former.][1]

Where, then, are we to seek for those additional articles of expense which are to swell the account to the enormous size that has been represented to us? The chief item which occurs to me respects the support of the judges of the United States. I do not add the President, because there is now a president of Congress, whose expenses may not be far, if anything, short of those which will be incurred on account of the President of the United States. The support of the judges will clearly be an extra expense, but to what extent will depend on the particular plan which may be adopted in regard to this matter. But upon no reasonable plan can it amount to a sum which will be an object of material consequence.

Let us now see what there is to counterbalance any extra expense that may attend the establishment of the proposed government. The first thing which presents itself is that a great part of the business which now keeps Congress sitting through the year will be transacted by the President. Even the management of foreign negotiations will naturally devolve upon him, according to general principles concerted with the Senate, and subject to their final concurrence. Hence it is evident that a portion of the year will suffice for the session of both the Senate and the House of Representatives; we may suppose about a fourth for the latter and a third, or perhaps half, for the former. The extra business of treaties and appointments may give this extra occupation to the Senate. From this circumstance we may infer that, until the House of Representatives shall be increased greatly beyond its present number, there will be a considerable saving of expense from the difference between the constant session of the present and the temporary session of the future Congress.

But there is another circumstance of great importance in the view of economy. The business of the United States has hitherto occupied the State legislatures, as well as Congress. The latter has made requisitions which the former have had to provide for.

[1] This sentence in brackets is omitted in the revised text.—EDITOR.

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Hence it has happened that the sessions of the State legislatures have been protracted greatly beyond what was necessary for the execution of the mere local business of the States. More than half their time has been frequently employed in matters which related to the United States. Now the members who compose the legislatures of the several States amount to two thousand and upwards, which number has hitherto performed what under the new system will be done in the first instance by sixty-five persons, and probably at no future period by above a fourth or a fifth of that number. The Congress under the proposed government will do all the business of the United States themselves, without the intervention of the State legislatures, who thenceforth will have only to attend to the affairs of their particular States, and will not have to sit in any proportion as long as they have heretofore done. This difference in the time of the sessions of the State legislatures will be clear gain, and will alone form an article of saving which may be regarded as an equivalent for any additional objects of expense that may be occasioned by the adoption of the new system.

The result from these observations is that the sources of additional expense from the establishment of the proposed Constitution are much fewer than may have been imagined; that they are counterbalanced by considerable objects of saving; and that while it is questionable on which side the scale will preponderate, it is certain that a government less expensive would be incompetent to the purposes of the Union. PUBLIUS.

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No. 85. (First collected edition, New York, 1788.) Hamilton.

CONCLUSION.

Manner in which subject has been discussed—An appeal to the reader to weigh the matter carefully and act conscientiously—Confidence of Publius in the arguments which he has advanced—The conceded imperfections no reason for delay—Extent of them exaggerated—The constitution not radically defective—Rights and interests of the people safe under the constitution—Not perfect, but a good plan—The state of the country forbids delay in vainly seeking a perfect plan—Difficulty of having another convention—Easier to cure defects by amendments after the adoption—No plan can be satisfactory to all the states—Supposed obstacles in the way of making subsequent amendments, considered—The ease with which a federal convention may be called to make amendments—Conclusion.

To the People of the State of New York:

According to the formal division of the subject of these papers, announced in my first number, there would appear still to remain for discussion two points: "the analogy of the proposed government to your own State constitution," and "the additional security which its adoption will afford to republican government, to liberty, and to property." But these heads have been so fully anticipated and exhausted in the progress of the work that it would now scarcely be possible to do anything more than repeat, in a more dilated form, what has been heretofore said, which the advanced stage of the question and the time already spent upon it conspire to forbid.

It is remarkable that the resemblance of the plan of the convention to the act which organizes the government of this State holds not less with regard to many of the supposed defects than to the real excellences of the former. Among the pretended defects are the re-eligibility of the Executive, the want of a council, the omission of a formal bill of rights, the omission of a provision respecting the liberty of the press. These and several others which have been noted in the course of our inquiries are as much chargeable on the existing constitution of this State as on the one proposed for the Union; and a man must have slender pretensions to consistency who can rail at the latter for imperfections which he finds no difficulty in excusing in the former. Nor indeed can there be a better proof of the insincerity and affectation of some of the zealous adversaries of the plan of the convention among us, who profess to be the devoted admirers of the government under

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which they live, than the fury with which they have attacked that plan for matters in regard to which our own constitution is equally or perhaps more vulnerable.

The additional securities to republican government, to liberty, and to property, to be derived from the adoption of the plan under consideration, consist chiefly in the restraints which the preservation of the Union will impose on local factions and insurrections, and on the ambition of powerful individuals in single States, who may acquire credit and influence enough, from leaders and favorites, to become the despots of the people; in the diminution of the opportunities to foreign intrigue, which the dissolution of the Confederacy would invite and facilitate; in the prevention of extensive military establishments, which could not fail to grow out of wars between the States in a disunited situation; in the express guaranty of a republican form of government to each; in the absolute and universal exclusion of titles of nobility; and in the precautions against the repetition of those practices on the part of the State governments which have undermined the foundations of property and credit, have planted mutual distrust in the breasts of all classes of citizens, and have occasioned an almost universal prostration of morals.

Thus have I, fellow-citizens, executed the task I had assigned myself; with what success, your conduct must determine. I trust at least you will admit that I have not failed in the assurance I gave you respecting the spirit with which my endeavors should be conducted. I have addressed myself purely to your judgments, and have studiously avoided those asperities which are too apt to disgrace political disputants of all parties, and which have been not a little provoked by the language and conduct of the opponents of the Constitution. The charge of a conspiracy against the liberties of the people, which has been indiscriminately brought against the advocates of the plan, has something in it too wanton and too malignant not to excite the indignation of every man who feels in his own bosom a refutation of the calumny. The perpetual changes which have been rung upon the wealthy, the well-born, and the great, have been such as to inspire the disgust of all sensible men. And the unwarrantable concealments and misrepresentations which have been in various ways practiced to keep

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the truth from the public eye have been of a nature to demand the reprobation of all honest men. It is not impossible that these circumstances may have occasionally betrayed me into intemperances of expression which I did not intend; it is certain that I have frequently felt a struggle between sensibility and moderation; and if the former has in some instances prevailed, it must be my excuse that it has been neither often nor much.

Let us now pause and ask ourselves whether, in the course of these papers, the proposed Constitution has not been satisfactorily vindicated from the aspersions thrown upon it; and whether it has not been shown to be worthy of the public approbation and necessary to the public safety and prosperity. Every man is bound to answer these questions to himself, according to the best of his conscience and understanding, and to act agreeably to the genuine and sober dictates of his judgment. This is a duty from which nothing can give him a dispensation. 'Tis one that he is called upon, nay, constrained by all the obligations that form the bands of society, to discharge sincerely and honestly. No partial motive, no particular interest, no pride of opinion, no temporary passion or prejudice, will justify to himself, to his country, or to his posterity, an improper election of the part he is to act. Let him beware of an obstinate adherence to party; let him reflect that the object upon which he is to decide is not a particular interest of the community, but the very existence of the nation; and let him remember that a majority of America has already given its sanction to the plan which he is to approve or reject.

I shall not dissemble that I feel an entire confidence in the arguments which recommend the proposed system to your adoption, and that I am unable to discern any real force in those by which it has been opposed. I am persuaded that this is the best which our political situation, habits, and opinions will admit, and superior to any the revolution has produced.

Concessions on the part of the friends of the plan, that it has not a claim to absolute perfection, have afforded

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matter of no small triumph to its enemies. "Why," say they, "should we adopt an imperfect thing? Why not amend it and make it perfect before it is irrevocably established?" This may be plausible enough, but it is only plausible. In the first place, I remark that the extent of these concessions has been greatly exaggerated. They have been stated as amounting to an admission that the plan is radically defective, and that without material alterations the rights and the interests of the community cannot be safely confided to it. This, as far as I have understood the meaning of those who make the concessions, is an entire perversion of their sense. No advocate of the measure can be found who will not declare as his sentiment that the system, though it may not be perfect in every part, is, upon the whole, a good one; is the best that the present views and circumstances of the country will permit; and is such an one as promises every species of security which a reasonable people can desire.

I answer, in the next place, that I should esteem it the extreme of imprudence to prolong the precarious state of our national affairs, and to expose the Union to the jeopardy of successive experiments, in the chimerical pursuit of a perfect plan. I never expect to see a perfect work from imperfect man. The result of the deliberations of all collective bodies must necessarily be a compound, as well of the errors and prejudices, as of the good sense and wisdom of the individuals of whom they are composed. The compacts which are to embrace thirteen distinct States in a common bond of amity and union must as necessarily be a compromise of as many dissimilar interests and inclinations. How can perfection spring from such materials?

The reasons assigned in an excellent little pamphlet lately published in this city,*[1] are unanswerable to show

* Entitled "An Address to the People of the State of New York."—PUBLIUS.

[1] Written by John Jay and reprinted in Ford's "Pamphlets on the Constitution."—EDITOR.

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the utter improbability of assembling a new convention under circumstances in any degree so favorable to a happy issue as those in which the late convention met, deliberated, and concluded. I will not repeat the arguments there used, as I presume the production itself has had an extensive circulation. It is certainly well worthy the perusal of every friend to his country. There is, however, one point of light in which the subject of amendments still remains to be considered, and in which it has not yet been exhibited to public view. I cannot resolve to conclude without first taking a survey of it in this aspect.

It appears to me susceptible of absolute demonstration that it will be far more easy to obtain subsequent than previous amendments to the Constitution. The moment an alteration is made in the present plan, it becomes, to the purpose of adoption, a new one, and must undergo a new decision of each State. To its complete establishment throughout the Union, it will therefore require the concurrence of thirteen States. If, on the contrary, the Constitution proposed should once be ratified by all the States as it stands, alterations in it may at any time be effected by nine States. Here, then, the chances are as thirteen to nine * in favor of subsequent amendment, rather than of the original adoption of an entire system.

This is not all. Every Constitution for the United States must inevitably consist of a great variety of particulars, in which thirteen independent States are to be accommodated in their interests or opinions of interest. We may of course expect to see, in any body of men charged with its original formation, very different combinations of the parts upon different points. Many of those who form a majority on one question may become the minority on a second, and an association dissimilar to either may constitute the majority on a third. Hence the necessity of molding and arranging all the particulars which are to compose the whole in such a manner as to

* It may rather be said TEN, for though two-thirds may set on foot the measure, three-fourths must ratify.—PUBLIUS.

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satisfy all the parties to the compact; and hence, also, an immense multiplication of difficulties and casualities in obtaining the collective assent to a final act. The degree of that multiplication must evidently be in a ratio to the number of particulars and the number of parties.

But every amendment to the Constitution, if once established, would be a single proposition, and might be brought forward singly. There would then be no necessity for management or compromise, in relation to any other point—no giving nor taking. The will of the requisite number would at once bring the matter to a decisive issue. And consequently, whenever nine, or rather ten States, were united in the desire of a particular amendment, that amendment must infallibly take place. There can, therefore, be no comparison between the facility of effecting an amendment, and that of establishing in the first instance a complete Constitution.

In opposition to the probability of subsequent amendments, it has been urged that the persons delegated to the administration of the national government will always be disinclined to yield up any portion of the authority of which they were once possessed. For my own part, I acknowledge a thorough conviction that any amendments which may, upon mature consideration, be thought useful, will be applicable to the organization of the government, not to the mass of its powers; and on this account alone, I think there is no weight in the observation just stated. I also think there is little weight in it on another account. The intrinsic difficulty of governing thirteen States at any rate, independent of calculations upon an ordinary degree of public spirit and integrity, will, in my opinion, constantly impose on the national rulers the necessity of a spirit of accommodation to the reasonable expectations of their constituents. But there is yet a further consideration, which proves beyond the possibility of a doubt that the observation is futile. It is this, that the national rulers, whenever nine States concur, will have no option upon the subject. By the fifth article of the plan, the Congress will be obliged

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"on the application of the legislatures of two-thirds of the States (which at present amount to nine), to call a convention for proposing amendments, which shall be valid, to all intents and purposes, as part of the Constitution, when ratified by the legislatures of three-fourths of the States, or by conventions in three-fourths thereof." The words of this article are peremptory. The Congress "shall call a convention." Nothing in this particular is left to the discretion of that body. And of consequence all the declamation about the disinclination to a change vanishes in air. Nor, however difficult it may be supposed to unite two-thirds or three-fourths of the State legislatures, in amendments which may affect local interests, can there be any room to apprehend any such difficulty in a union on points which are merely relative to the general liberty or security of the people. We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority.

If the foregoing argument is a fallacy, certain it is that I am myself deceived by it, for it is, in my conception, one of those rare instances in which a political truth can be brought to the test of a mathematical demonstration. Those who see the matter in the same light with me, however zealous they may be for amendments, must agree in the propriety of a previous adoption as the most direct road to their own object.

The zeal for attempts to amend, prior to the establishment of the Constitution, must abate in every man who is ready to accede to the truth of the following observations of a writer equally solid and ingenious: "To balance a large state or society (says he), whether monarchical or republican, on general laws, is a work of so great difficulty that no human genius, however comprehensive, is able, by the mere dint of reason and reflection, to effect it. The judgments of many must unite in the work; experience must guide their labor; time must bring it to perfection, and the feeling of inconveniences must correct the mistakes which they *inevitably* fall into

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in their first trials and experiments."* These judicious reflections contain a lesson of moderation to all the sincere lovers of the Union, and ought to put them upon their guard against hazarding anarchy, civil war, a perpetual alienation of the States from each other, and perhaps the military despotism of a victorious demagogue, in the pursuit of what they are not likely to obtain but from time and experience. It may be in me a defect of political fortitude, but I acknowledge that I cannot entertain an equal tranquillity with those who affect to treat the dangers of a longer continuance in our present situation as imaginary. A nation without a national government is in my view an awful spectacle. The establishment of a Constitution, in time of profound peace, by the voluntary consent of a whole people, is a prodigy, to the completion of which I look forward with trembling anxiety. I can reconcile it to no rules of prudence to let go the hold we now have, in so arduous an enterprise, upon seven out of the thirteen States, and, after having passed over so considerable a part of the ground, to recommence the course. I dread the more the consequences of new attempts because I know that powerful individuals, in this and in other States, are enemies to a general national government in every possible shape. PUBLIUS.

* Hume's "Essays," vol. i. p. 128: "The Rise of Arts and Sciences." —PUBLIUS.

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APPENDIX.

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APPENDIX.

ARTICLES OF CONFEDERATION, 1781

ARTICLES of Confederation and perpetual Union between the States of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia.

ARTICLE I.

The style of this Confederacy shall be "The United States of America."

ARTICLE II.

Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States in Congress assembled.

ARTICLE III.

The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.

ARTICLE IV.

The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States, and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; provided also, that no imposition, duties, or restriction shall be laid by any State, on the property of the United States, or either of them.

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If any person guilty of or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall, upon demand of the governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense.

Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State.

ARTICLE V.

For the more convenient management of the general interest of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year.

No State shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years, nor shall any person, being a delegate, be capable of holding any office under the United States for which he or another for his benefit receives any salary, fees, or emolument of any kind.

Each State shall maintain its own delegates in a meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States, in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress, and the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on, Congress, except for treason, felony, or breach of the peace.

ARTICLE VI.

No State, without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty with, any king, prince, or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever from any king, prince, or foreign state; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

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No State shall lay any imposts or duties, which may interfere with any stipulations in treaties entered into by the United States in Congress assembled, with any king, prince, or state, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any State, except such number only as shall be deemed necessary by the United States in Congress assembled, for the def ıse of such State or its trade; nor shall any body of forces be kept up by any State, in time of peace, except such number only as in the judgment of the United States in Congress assembled shall be deemed requisite to garrison the forts necessary for the defense of such State; but every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition, and camp equipage.

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or state, and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

ARTICLE VII.

When land forces are raised by any State for the common defense, all officers of or under the rank of colonel shall be appointed by the legislature of each State respectively, by whom such forces shall be raised, or in such manner as such State shall direct; and all vacancies shall be filled up by the State which first made the appointment.

ARTICLE VIII.

All charges of war and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, and such land and the buildings and improvements thereon shall be estimated according to such mode as

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the United States in Congress assembled shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States within the time agreed upon by the United States in Congress assembled.

ARTICLE IX.

The United States in Congress assembled shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article—of sending and receiving ambassadors—entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever—of establishing rules for deciding, in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated—of granting letters of marque and reprisal in time of peace—appointing courts for the trial of piracies and felonies committed on the high seas, and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed judge of any of the said courts.

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following:—Whenever the legislative or executive authority or lawful agent of any State in controversy with another shall present a petition to Congress stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot, and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination; and if either party shall neglect to attend at the day appointed, without showing reasons, which Congress shall

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judge sufficient, or, being present, shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the Secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned: provided that every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the judges of the Supreme or Superior Court of the State where the cause shall be tried, "*well and truly to hear and determine the matter in question according to the best of his judgment, without favor, affection, or hope of reward,*" provided also that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil, claimed under different grants of two or more States, whose jurisdictions as they may respect such lands and the States which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall, on the petition of either party to the Congress of the United States, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States—fixing the standard of weights and measures throughout the United States—regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated—establishing or regulating post offices from one State to another, throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office—appointing all officers of the land forces in the service of the United States, excepting regimental officers—appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States—making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States in Congress assembled shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated "A Committee of the States," and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction; to appoint one of their

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number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years—to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses—to borrow money, or emit bills on the credit of the United States, transmitting every half-year to the respective States an account of the sums of money so borrowed or emitted—to build and equip a navy—to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State; which requisition shall be binding, and thereupon the legislature of each State shall appoint the regimental officers, raise the men, and clothe, arm, and equip them in a soldier-like manner, at the expense of the United States, and the officers and men so clothed, armed, and equipped shall march to the place appointed, and within the time agreed on by the United States in Congress assembled; but if the United States in Congress assembled shall, on consideration of circumstances, judge proper that any State should not raise men, or should raise a smaller number than its quota, and that any other State should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, clothed, armed, and equipped in the same manner as the quota of such State, unless the legislature of such State shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise, officer, clothe, arm, and equip as many of such extra number as they judge can be safely spared: and the officers and men, so clothed, armed, and equipped shall march to the place appointed, and within the time agreed on, by the United States in Congress assembled.

The United States in Congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander-in-chief of the army or navy, unless nine States assent to the same; nor shall a question on any other point, except for adjourning from day to day, be determined, unless by the votes of a majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances, or military operations, as in their judgment require secrecy, and the yeas and nays of the delegates of each State on any question shall be entered on the journal, when it is desired by any delegate; and the delegates of a State, or any of them, at his

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or their request, shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the legislatures of the several States.

ARTICLE X.

The Committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of nine States, shall from time to time think expedient to vest them with: provided that no power be delegated to the said Committee, for the exercise of which, by the Articles of Confederation, the voice of nine States in the Congress of the United States assembled is requisite.

ARTICLE XI.

Canada, acceding to this Confederation, and joining in the measures of the United States, shall be admitted into and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

ARTICLE XII.

All bills of credit emitted, moneys borrowed, and debts contracted by or under the authority of Congress, before the assembling of the United States in pursuance of the present Confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States and the public faith are hereby solemnly pledged.

ARTICLE XIII.

Every State shall abide by the determinations of the United States in Congress assembled, on all questions which by this Confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.

AND WHEREAS it hath pleased the Great Governor of the world to incline the hearts of the legislatures we respectively represent in Congress to approve of and to authorize us to ratify the said Articles of Confederation and perpetual Union, KNOW YE, That we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said Articles of Confederation and perpetual Union, and all and singular the matters and things therein contained: and we do further solemnly plight and engage the faith of our respective constituents that they shall abide by the determinations of the United States in Congress assembled, on all

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questions which by the said Confederation are submitted to them. And that the Articles thereof shall be inviolably observed by the States we respectively represent, and the Union shall be perpetual.

THE CONSTITUTION OF THE UNITED STATES OF AMERICA.*

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

Chisholm *v.* Georgia, 2 Dall. 419; McCulloch *v.* State of Maryland et al., 4 Wh. 316; Brown et als. *v.* Maryland, 12 Wh. 419; Barron *v.* The Mayor and City Council of Baltimore, 7 Pet. 243; Lane County *v.* Oregon, 7 Wall. 71; Texas *v.* White et al., 7 Wall. 700.

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*In May, 1785, a committee of Congress made a report recommending an alteration in the articles of confederation, but no action was taken on it, and it was left to the state legislatures to proceed in the matter. In January, 1786, the legislature of Virginia passed a resolution providing for the appointment of five commissioners, who, or any three of whom, should meet such commissioners as might be appointed in the other states of the Union, at a time and place to be agreed upon, to take into consideration the trade of the United States; to consider how far a uniform system in their commercial regulations might be necessary to their common interest and their permanent harmony; and to report to the several states such an act, relative to this great object as, when ratified by them, would enable the United States in Congress effectually to provide for the same. The Virginia commissioners, after some correspondence, fixed the first Monday in September as the time, and the city of Annapolis as the place for the meeting, but only four other States were represented, viz.: Delaware, New York, New Jersey, and Pennsylvania; the commissioners appointed by Massachusetts, New Hampshire, North Carolina, and Rhode Island failed to attend. Under the circumstances of so partial a representation, the commissioners present agreed upon a report (drawn by Mr. Hamilton, of New York), expressing their unanimous conviction that it might essentially tend to advance the interests of the Union if the states by which they were respectively delegated would concur, and use their endeavors to procure the concurrence of the other states, in the appointment of commissioners to meet at Philadelphia on the second Monday of May following, to take into consideration the situation of the United States; to devise such further provisions as should appear to them necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union; and to report such an act for that purpose to the United States in Congress assembled as, when agreed to by them and afterward confirmed by the legislatures of every state, would effectually provide for the same.

Congress, on the 21st of February, 1787, adopted a resolution in favor

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ARTICLE I.

SECTION I. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Hayburn's Case (notes), 2 Dall. 409.

SEC. II. [1] The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

In re Green, 134 U. S. 377.

[2] No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[3] * [Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those

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of a convention, and the legislatures of those States (with the exception of Rhode Island) which had not already appointed delegates, promptly did so. On the 25th of May, seven states having convened, George Washington, of Virginia, was unanimously elected President of the convention, and the consideration of the proposed constitution was begun. On the 17th of September, 1787, the constitution as engrossed and agreed upon was signed by all the members present, except Mr. Gerry, of Massachusetts, and Messrs. Mason and Randolph, of Virginia. The President of the convention transmitted it to Congress, with a resolution stating how the proposed Federal Government should be put in operation, and an explanatory letter. Congress, on the 28th of September, 1787, directed the constitution so framed, with the resolutions and letter concerning the same, to "be transmitted to the several Legislatures in order to be submitted to a convention of delegates chosen in each State by the people thereof, in conformity to the resolves of the convention."

On the 4th of March, 1789, the day which had been fixed for starting the system of Government, the new constitution had been ratified by the conventions chosen in each state to consider it, as follows: Delaware, December 7, 1787; Pennsylvania, December 12, 1787; New Jersey, December 18, 1787; Georgia, January 2, 1788; Connecticut, January 9, 1788; Massachusetts, February 6, 1788; Maryland, April 28, 1788; South Carolina, May 23, 1788; New Hampshire, June 21, 1788; Virginia, June 26, 1788; and New York, July 26, 1788.

The President informed Congress, on the 28th of January, 1790, that North Carolina had ratified the constitution November 21, 1789; and he informed Congress on the 1st of June, 1790, that Rhode Island had ratified the constitution May 29, 1789. Vermont, in convention, ratified the constitution January 10, 1791, and was, by an act of Congress approved February 18, 1791, "received and admitted into this Union as a new and entire member of the United States."

* The clause included in brackets is amended by the XIVth amendment, second section, p

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bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons.] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

Veazie Bank *v.* Fenno, 8 Wall. 533; Scholey *v.* Rew, 23 Wall. 331; Pollock *v.* Farmers' Loan and Trust Co., 157 U. S. 429.

[4] When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

[5] The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SEC. III. [1] The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

[2] Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one-third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

[3] No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

[4] The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

[5] The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

[6] The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two-thirds of the Members present.

[7] Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy

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any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SEC. IV. [1] The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Ex parte Siebold, 100 U. S. 371; Ex parte Yarborough, 110 U. S. 651.

[2] The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SEC. V. [1] Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

In re Loney, 134 U. S. 372.

[2] Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two-thirds, expel a Member.

Anderson *v.* Dunn, 6 Wh. 204; Kilbourn *v.* Thompson, 103 U. S. 168; U. S. *v.* Bollin, 144 U. S. 1.

[3] Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one-fifth of those Present, be entered on the Journal.

[4] Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SEC. VI. [1] The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

Coxe *v.* M'Clenachan, 3 Dal. 478.

[2] No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time, and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SEC. VII. [1] All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other bills.

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[2] Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two-thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

[3] Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SEC. VIII. [1] The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States;

Hylton *v.* United States, 3 Dall. 171; McCulloch *v.* State of Maryland, 4 Wh. 316; Loughborough *v.* Blake, 5 Wh. 317; Osborn *v.* Bank of the United States, 9 Wh. 738; Weston et al. *v.* City Council of Charleston, 2 Pet. 449; Dobbins *v.* The Commissioners of Erie County, 16 Pet. 435; License Cases, 5 How. 504; Cooley *v.* Board of Wardens of Port of Philadelphia et al., 12 How. 299; McGuire *v.* The Commonwealth, 3 Wall. 387; Van Allen *v.* The Assessors, 3 Wall. 573; Bradley *v.* The People, 4 Wall. 459.

License Tax Cases, 5 Wall 462; Pervear *v.* The Commonwealth, 5 Wall. 475; Woodruff *v.* Parham, 8 Wall. 123; Hinson *v.* Lott, 8 Wall 148; Veazie Bank *v.* Fenno, 8 Wall. 533; The Collector *v.* Day, 11 Wall. 113; United States *v.* Singer, 15 Wall. 111; State Tax on Foreign-held Bonds, 15 Wall. 300; United States *v.* Railroad Company, 17 Wall. 322; Railroad Company *v.* Peniston, 18 Wall. 5; Scholey *v.* Rew, 23 Wall. 331; Springer *v.* United States, 102 U. S. 586; Legal Tender Case, 110 U. S. 421; California *v.* Central Pacific Railroad Co., 127 U. S. 1; Ratterman *v.* Western Union Telegraph Co., 127 U. S. 411; Leloup *v.* Port

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of Mobile, 127 U. S. 640; Field *v.* Clark, 143 U. S. 649; Pollock *v.* Farmers Loan & Trust Co., 157 U. S. 429.

[2] To borrow Money on the credit of the United States;

McCulloch *v.* The State of Maryland, 4 Wh. 316; Weston et al. *v.* The City Council of Charleston, 2 Pet. 449; Bank of Commerce *v.* New York City, 2 Black 620; Bank Tax Cases, 2 Wall. 200; The Banks *v.* The Mayor, 7 Wall. 16; Bank *v.* Supervisors, 7 Wall. 26; Hepburn *v.* Griswold, 8 Wall. 603; National Bank *v.* Commonwealth, 9 Wall. 353; Parker *v.* Davis, 12 Wall. 457; Legal Tender Case, 110 U. S. 421.

[3] To regulate Commerce with foreign Nations, and among the Several States, and with the Indian Tribes;

Gibbons *v.* Ogden, 9 Wh. 1; Brown et al. *v.* State of Maryland, 12 Wh. 419; Wilson et al. *v.* Black Bird Creek Marsh Company, 2 Pet. 245; Worcester *v.* The State of Georgia, 6 Pet. 515; City of New York *v.* Miln, 11 Pet. 102; United States *v.* Coombs, 12 Pet. 72; Holmes *v.* Jennison et al. 14 Pet. 540; License Cases, 5 How. 504; Passenger Cases, 7 How. 283; Nathan *v.* Louisiana, 8 How. 73; Mager *v.* Grima et al., 8 How. 490; United States *v.* Marigold, 9 How. 560; Cowley *v.* Board of Wardens of Port of Philadelphia, 12 How. 299; The Propeller Genesee Chief et al. *v.* Fitzhugh et al., 12 How. 443; State of Pennsylvania *v.* The Wheeling Bridge Co., 13 How. 518; Veazie et al. *v.* Moore, 14 How. 568; Smith *v.* State of Maryland, 18 How. 71; State of Pennsylvania *v.* The Wheeling and Belmont Bridge Co., et al., 18 How. 421; Sinnitt *v.* Davenport, 22 How. 227; Foster et al. *v.* Davenport et al., 22 How. 244; Conway et al. *v.* Taylor's Ex., 1 Black 603; United States *v.* Holliday, 3 Wall. 407; Gilman *v.* Philadelphia, 3 Wall. 713; The Passaic Bridges, 3 Wall. 782; Steamship Company *v.* Port Wardens, 6 Wall. 31; Crandall *v.* State of Nevada, 6 Wall. 35; White's Bank *v.* Smith, 7 Wall. 646; Waring *v.* The Mayor, 8 Wall. 110; Paul *v.* Virginia, 8 Wall. 168; Thomson *v.* Pacific Railroad, 9 Wall. 579; Downham et al. *v.* Alexandria Council, 10 Wall. 173; The Clinton Bridge, 10 Wall. 454; The Daniel Ball, 10 Wall. 557; Liverpool Insurance Company *v.* Massachusetts, 10 Wall. 566; The Montello, 11 Wall. 411; Ex parte McNiel, 13 Wall. 236; State Freight Tax, 15 Wall. 232; State Tax on Railway Gross Receipts, 15 Wall. 284; Osborn *v.* Mobile, 16 Wall. 479; Railroad Company *v.* Fuller, 17 Wall. 560; Bartemeyer *v.* Iowa, 18 Wall. 129; The Delaware Railroad Tax, 18 Wall. 206; Peete *v.* Morgan, 19 Wall. 581; Railroad Company *v.* Richmond, 19 Wall. 584; B. & O. Railroad Company *v.* Maryland, 21 Wall. 456; The Lottawanna, 21 Wall. 558; Henderson et al. *v.* The Mayor of the City of New York, 92 U. S. 259; Chy Lung *v.* Freeman et al., 92 U. S. 275; South Carolina *v.* Georgia et al. 93 U. S. 4; Sherlock et al. *v.* Alling, adm., 93 U. S. 99; United States *v.* Forty-three gallons of Whiskey, etc., 93 U. S. 188; Foster *v.* Master and Wardens of the Port of New Orleans,

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94 U. S. 246; Railroad Company *v.* Husen, 95 U. S. 465; Pensacola Tel. Co. *v.* W. U. Tel. Co., 96 U. S. 1; Beer Co. *v.* Massachusetts, 97 U. S. 25; Cook *v.* Pennsylvania, 97 U. S. 566; Packet Co. *v.* St. Louis, 100 U. S. 423; Wilson *v.* McNamee, 102 U. S. 572; Moran *v.* New Orleans, 112 U. S. 69; Head Money Cases, 112 U. S. 580; Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196; Brown *v.* Houston, 114 U. S. 622; Walling *v.* Michigan, 116 U. S. 446; Pickard *v.* Pullman Southern Car Co., 117 U. S. 34; Tennessee *v.* Pullman Southern Car Co., 117 U. S. 51; Spraigue *v.* Thompson, 118 U. S. 90; Morgan *v.* Louisiana, 118 U. S. 455; Wabash, St. Louis, and Pacific Ry. *v.* Illinois, 118 U. S. 557; Huse *v.* Glover, 119 U. S. 543; Robbins *v.* Shelby Co. Taxing Dist., 120 U. S. 489; Corson *v.* Maryland, 120 U. S. 502; Barron *v.* Burnside, 121 U. S. 186; Fargo *v.* Michigan, 121 U. S. 230; Ouachita Packet Co. *v.* Aiken, 121 U. S. 444; Phila. and Southern S. S. Co. *v.* Penna., 122 U. S. 326; W. U. Tel. Co. *v.* Pendleton, 122 U. S. 347; Sands *v.* Manistee River Imp. Co., 123 U. S. 288; Smith *v.* Alabama, 124 U. S. 465; Willamette Iron Bridge Co. *v.* Hatch, 125 U. S. 1; Pembina Mine Co. *v.* Penna., 125 U. S. 181; Bowman *v.* Chicago Northwestern Rwy. Co., 125 U. S. 465; Western Union Tel. Co. *v.* Mass., 125 U. S. 530; California *v.* Central Pacific R. R. Co., 127 U. S. 1; Leloup *v.* Port of Mobile, 127 U. S. 640; Kidd *v.* Pearson, 128 U. S. 1; Asher *v.* Texas, 128 U. S. 129; Stoutenberg *v.* Hennick, 129 U. S. 141; Western Union Tel. Co. *v.* Alabama, 132 U. S. 472; Fritts *v.* Palmer, 132 U. S. 282; Louisville, N. O., etc., Railway *v.* Mississippi, 133 U. S. 587; Leisy *v.* Hardin, 135 U. S. 100; Lyng *v.* Michigan, 135 U. S. 161; Cherokee Nation *v.* Kansas Railway Co., 135 U. S. 641; McCall *v.* California, 136 U. S. 104; Norfolk and Western R. Rd. *v.* Pennsylvania, 136 U. S. 114; Minnesota *v.* Barber, 136 U. S. 313; Texas & Pacific Ry. Co. *v.* Southern Pacific Co., 137 U. S. 48; Brimmer *v.* Rebman, 138 U. S. 78; Manchester *v.* Mass., 139 U. S. 240; In re Rahrer, 140 U. S. 545; Pullman Palace Car Co. *v.* Penna., 141 U. S. 18; Pullman Palace Car Co. *v.* Hayward, 141 U. S. 36; Mass. *v.* Western Union Tel. Co., 141 U. S. 40; Crutcher *v.* Kentucky, 141 U. S. 47; Henderson Bridge Co. *v.* Henderson, 141 U. S. 679; In re Garnett, 141 U. S. 1; Maine *v.* Grand Trunk Ry. Co., 142 U. S. 217; Mishimura Ekin *v.* U. S., 142 U. S. 651; Pacific Ex. Co. *v.* Seibert, 142 U. S. 339; Horn Silver Mining Co. *v.* New York, 143 U. S. 305; Chic. & Grand Trunk Ry. Co. *v.* Wellman, 143 U. S. 339; Budd *v.* N. Y., 143 U. S. 517; Ficklen *v.* Shelby Co. Taxing Dist., 145 U. S. 1; Lehigh Valley R. Rd. *v.* Pennsylvania, 145 U. S. 192; Interstate Commerce Comm'n *v.* B. & O. R. Rd. 145 U. S. 264; Brennan *v.* Titusville, 153 U. S. 289; Brass *v.* Stoeser, 153 U. S. 391; Ashley *v.* Ryan, 153 U. S. 436; Luxton *v.* N. River Bridge Co., 153 U. S. 529; Erie R. Rd. *v.*

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Penna., 153 U. S. 628; Postal Tel. Cable Co. *v.* Charleston, 153 U. S. 692; Covington & Cinc'ti Bridge Co. *v.* Ky., 154 U. S. 204; Plumley *v.* Mass., 155 U. S. 461; Texas and Pacific Rwy. Co. *v.* Interstate Transfer Co., 155 U. S. 585; Hooper *v.* Calif., 155 U. S. 648; Postal Tel. Cable Co., *v.* Adams, 155 U. S. 688; U. S. *v.* E. C. Knight & Co., 156 U. S. 1; Ernest *v.* Missouri, 156 U. S. 296; N. Y., L. E. & West'n *v.* Penna., 158 U. S. 431; Pittsburgh & So. Coal Co. *v.* Bates, 156 U. S. 577; Pittsburgh & So. Coal Co. *v.* La., 156 U. S. 590; Gulf, Colo. & S. F. Rwy. Co. *v.* Hefley, 158 U. S. 98; In re Debs, 158 U. S. 564.

[4] To establish an uniform Rule of Naturalization, [1] and uniform Laws on the subject of Bankruptcies throughout the United States; [2]

[2] Sturgis *v.* Crowninshield, 4 Wh. 122; [2] McMillan *v.* McNeil, 4 Wh. 209; [2] Farmers and Mechanics' Bank, Pennsylvania, *v.* Smith, 6 Wh. 131; [2] Ogden *v.* Saunders, 12 Wh. 213; [2] Boyle *v.* Zacharie and Turner, 6 Pet. 348; [1] Gassies *v.* Ballon, 6 Pet. 761; [2] Beers et al. *v.* Haughton, 9 Pet. 329; [2] Suydam et al. *v.* Broadnax, 14 Pet. 67; [2] Cook *v.* Moffat et al., 5 How. 295; [1] Dred Scott *v.* Sanford, 19 How. 393.

[5] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

Briscoe *v.* The Bank of the Commonwealth of Kentucky, 11 Pet. 257; Fox *v.* The State of Ohio, 5 How. 410; United States *v.* Marigold, 9 How. 560.

[6] To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

Fox *v.* The State of Ohio, 5 How. 410; United States *v.* Marigold, 9 How. 560.

[7] To establish Post Offices and post Roads;

State of Pennsylvania *v.* The Wheeling and Belmont Bridge Company, 18 How. 421; Homer *v.* U. S., 143 U. S. 207; In re Rapier, 143 U. S. 110; In re Debs, 158 U. S. 564.

[8] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

Grant et al. *v.* Raymond, 6 Pet. 218; Wheaton et al. *v.* Peters et al., 8 Pet. 591.

[9] To constitute Tribunals inferior to the supreme Court;

[10] To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

United States *v.* Palmer, 3 Wh. 610; United States *v.* Wiltberger, 5 Wh. 76; United States *v.* Smith, 5 Wh. 153; United States *v.* Pirates, 5 Wh. 184; United States *v.* Arizona, 120 U. S. 479.

[11] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

Brown *v.* United States, 8 Cr. 110; American Insurance Company et al. *v.* Canter (356 bales cotton), 1 Pet. 511;

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Mrs. Alexander's Cotton, 2 Wall. 404; Miller *v.* United States, 11 Wall. 268; Tyler *v.* Defrees, 11 Wall. 331; Stewart *v.* Kahn, 11 Wall. 493; Hamilton *v.* Dillin, 21 Wall. 73; Lamar, ex., *v.* Browne et al., 92 U. S. 187.

[13] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

Crandall *v.* State of Nevada, 6 Wall. 32.

[14] To provide and maintain a Navy;

United States *v.* Bevans, 3 Wh. 336; Dynes *v.* Hoover, 20 How. 65.

[15] To make Rules for the Government and Regulation of the land and naval Forces;

[16] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

Houston *v.* Moore, 5 Wh. 1; Martin *v.* Mott, 12 Wh. 19; Luther *v.* Borden, 7 How. 1; Crandall *v.* State of Nevada, 6 Wall. 35; Texas *v.* White, 7 Wall. 700.

[17] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

Houston *v.* Moore, 5 Wh. 1; Martin *v.* Mott, 12 Wh. 19; Luther *v.* Borden, 7 How. 1.

[18] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

Hepburn et al. *v.* Ellzey, 2 Cr. 444; Loughborough *v.* Blake, 5 Wh. 317; Cohens *v.* Virginia, 6 Wh. 264; American Insurance Company *v.* Canter (356 bales cotton), 1 Pet. 511; Kendall, Postmaster General, *v.* The United States, 12 Pet. 524; United States *v.* Dewitt, 9 Wall. 41; Dunphy *v.* Kleinsmith et al., 11 Wall. 610; Willard *v.* Presbury, 14 Wall. 676; Phillips *v.* Payne, 92 U. S. 130; United States *v.* Fox, 94 U. S. 315; National Bank *v.* Yankton County, 101 U. S. 129; Ft. Leavenworth R. Rd. Co. *v.* Howe, 114 U. S. 525; Benson *v.* U. S., 146 U. S. 325: Shoemaker *v.* U. S., 147 U. S. 282.

[19] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

McCulloch *v.* The State of Maryland, 4 Wh. 316; Wayman *v.* Southard, 10 Wh. 1; Bank of United States *v.* Halstead, 10 Wh. 51; Hepburn *v.* Griswold, 8 Wall. 603; National Bank *v.* Commonwealth, 9 Wall. 353; Thomson *v.*

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Pacific Railroad, 9 Wall. 579; Parker *v.* Davis, 12 Wall. 457; Railroad Company *v.* Johnson, 15 Wall. 195; Railroad Company *v.* Peniston, 18 Wall. 5; Legal Tender Case, 110 U. S. 421; In re Coy, 127 U. S. 731; Stoutenburgh *v.* Hennick, 129 U. S. 141; Chinese Ex. Case, 130 U. S. 581; In re Neagle, 135 U. S. 1; St. Paul, Minneapolis & Manitoba Ry. Co. *v.* Phelps, 137 U. S. 528; Homer *v.* U. S., 143 U. S. 570; Logan *v.* U. S., 144 U. S. 263; Fong-Yue Ting *v.* U. S., 149 U. S. 698; Lees *v.* U. S., 150 U. S. 476; Luxton *v.* North River Bridge Co., 153 U. S. 529; Erie R. Rd. *v.* Penna., 153 U. S. 628; Postal Tel. Cable Co., *v.* Charleston, 153 U. S. 692; Clune *v.* U. S., 159 U. S. 590.

SEC. IX. [1] The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

Dred Scott *v.* Sanford, 19 How. 393.

[2] The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

United States *v.* Hamilton, 3 Dall. 17; Hepburn et al. *v.* Ellzey, 2 Cr. 445; Ex parte Bollman and Swartwout, 4 Cr. 75; Ex parte Kearney, 7 Wh. 38; Ex parte Tobias Watkins, 3 Pet. 192; Ex parte Milburn, 9 Pet. 704; Holmes *v.* Jennison et al., 14 Pet. 540; Ex parte Dorr, 3 How. 103; Luther *v.* Borden, 7 How. 1; Ableman *v.* Booth and United States *v.* Booth, 21 How. 506; Ex parte Vallandigham, 1 Wall. 243; Ex parte Mulligan, 4 Wall. 2; Ex parte McCardle, 7 Wall. 506; Ex parte Yerger, 8 Wall. 85; Tarble's Case, 13 Wall. 397; Ex parte Lange, 18 Wall. 16; Ex parte Parks, 93 U. S. 18; Ex parte Karstendick, 93 U. S. 396; Ex parte Virginia, 100 U. S. 339; In re Neagle, 135 U. S. 1; In re Duncan, 139 U. S. 449.

[3] No Bill of Attainder or ex post facto Law shall be passed.

Fletcher *v.* Peck, 6 Cr. 87; Odgen *v.* Saunders, 12 Wh. 213; Watson et al. *v.* Mercer, 8 Pet. 88; Carpenter et al. *v.* Commonwealth of Pennsylvania, 17 How. 456; Locke *v.* New Orleans, 4 Wall. 172; Cummings *v.* The State of Missouri, 4 Wall. 277; Ex parte Garland, 4 Wall. 333; Drehman *v.* Stifle, 8 Wall. 595; Klinger *v.* State of Missouri, 13 Wall. 257; Pierce *v.* Carskadon, 16 Wall. 234; Holden *v.* Minnesota, 137 U. S. 483; Cook *v.* U. S., 138 U. S. 157.

[4] No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration hereinbefore directed to be taken.

License Tax Cases, 5 Wall. 462; Springer *v.* United States, 102 U. S. 586; Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429.

[5] No Tax or Duty shall be laid on Articles exported from any State,

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Cooley *v.* Board of Wardens of Port of Philadelphia, 12 How. 299; Page *v.* Burgess, collector, 92 U. S. 372; Turpin *v.* Burgess, 117 U. S. 504; Pittsburgh & Southern Coal Co. *v.* Bates, 156 U. S. 577.

[6] No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

Cooley *v.* Board of Wardens of Port of Philadephia et al., 12 How. 299; State of Pennsylvania *v.* Wheeling and Belmont Bridge Company et al., 18 How. 421; Munn *v.* Illinois, 94 U. S. 113; Packet Co. *v.* St. Louis, 100 U. S. 413; Packet Co. *v.* Catlettsburg, 105 U. S. 559; Morgan S. S. Co. *v.* La. Board of Health, 118 U. S. 455.

[7] No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

[8] No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SEC. X. [1] No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; [1] make any thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, [2] or Law impairing the Obligation of Contracts, [3] or grant any Title of Nobility.

[1] Calder and Wife *v.* Bull and Wife, 3 Dall. 386; [2] Fletcher *v.* Peck, 6 Cr. 87; [2] State of New Jersey *v.* Wilson, 7 Cr. 164; [2] Sturgis *v.* Crowninshield, 4 Wh. 122; [2] McMillan *v.* McNeil, 4 Wh. 209; [2] Dartmouth College *v.* Woodward, 4 Wh. 518; [2] Owings *v.* Speed, 5 Wh. 420; [2] Farmers' and Mechanics' Bank *v.* Smith, 6 Wh. 131; [2] Green et al. *v.* Biddle, 8 Wh. 1; [2] Ogden *v.* Saunders, 12 Wh. 213; [2] Mason *v.* Haile, 12 Wh. 370; [2] Satterlee *v.* Matthewson, 2 Pet. 380; [2] Hart *v.* Lamphire, 3 Pet. 280; [1] Craig et al. *v.* State of Missouri, 4 Pet. 410; [2] Providence Bank *v.* Billings and Pitman, 4 Pet. 514; [1] Byrne *v.* State of Missouri, 8 Pet. 40; [2] Watson *v.* Mercer, 8 Pet. 88; [2] Mumma *v.* Potomac Company, 8 Pet. 281; [2] Beers *v.* Haughton, 9 Pet. 329; [1] Briscoe et al. *v.* The Bank of the Commonwealth of Kentucky, 11 Pet. 257; [2] The Proprietors of Charles River Bridge *v.* The Proprietors of Warren Bridge, 11 Pet. 420; [2] Armstrong *v.* The Treasurer of Athens Company, 16 Pet. 281; [2] Bronson *v.* Kinzie et al., 1 How. 311; [2] McCracken *v.* Hayward, 2 How. 608; [2] Gordon *v.* Appeal Tax Court, 3 How. 133; [2] State of Maryland *v.* Baltimore and Ohio R. R. Co., 3 How. 534; [2] Neil, Moore & Co. *v.* State of Ohio, 3 How. 720; [2] Cook *v.* Moffatt, 5 How. 295; [2] Planters' Bank *v.* Sharp et al., 6 How.

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301 ; [8] West River Bridge Company *v.* Dix et al., 6 How. 507; [8] Crawford et al., *v.* Branch Bank of Mobile, 7 How. 279; [8] Woodruff *v.* Trapnall, 10 How. 190; [8] Paup et al. *v.* Drew, 10 How. 218; [2,8] Baltimore and Susquehanna R. R. Co. *v.* Nesbitt et al., 10 How. 395; [8] Butler et al. *v.* Pennsylvania, 10 How. 402; [1] Darrington et al. *v.* The Bank of Alabama, 13 How. 12; [8] Richmond, etc., R. R. Co., *v.* The Louise R. R. Co., 13 How. 71; [8] Trustees for Vincennes University *v.* State of Indiana, 14 How. 268; [8] Curran *v.* State of Arkansas et al., 15 How. 304: [8] State Bank of Ohio *v.* Knoop, 16 How. 369; [2] Carpenter et al. *v.* Commonwealth of Pennsylvania, 17 How. 456; [8] Dodge *v.* Woolsey, 18 How. 331; [8] Beers *v.* State of Arkansas, 20 How. 527; [8] Aspinwall et al. *v.* Commissioners of County of Daviess, 22 How. 364; [8] Rector of Christ Church, Philadelphia, *v.* County of Philadelphia, 24 How. 300; [8] Howard *v.* Bugbee, 24 How. 461; [8] Jefferson Branch Bank *v.* Skelley, 1 Black 436; [8] Franklin Branch Bank *v.* State of Ohio, 1 Black 474; [8] Trustees of the Wabash and Erie Canal Company *v.* Beers, 2 Black 448; [8] Gilman *v.* City of Sheboygan, 2 Black 510; [8] Bridge Proprietors *v.* Hoboken Company, 1 Wall. 116; [8] Hawthorne *v.* Calef, 2 Wall. 10; [8] The Binghamton Bridge, 3 Wall. 51; [8] The Turnpike Company *v.* The State, 3 Wall. 210; [2] Locke *v.* City of New Orleans, 4 Wall. 172; [8] Railroad Company *v.* Rock, 4 Wall. 177; [8] Cummings *v.* State of Missouri, 4 Wall. 277; [2] Ex parte Garland, 4 Wall. 333; [8] Von Hoffman *v.* City of Quincy, 4 Wall. 535; [8] Mulligan *v.* Corbins, 7 Wall. 487; [8] Furman *v.* Nichol, 8 Wall. 44; [8] Home of the Friendless *v.* Rouse, 8 Wall. 430; [8] The Washington University *v.* Rouse, 8 Wall. 439; [8] Butz *v.* City of Muscatine, 8 Wall. 575; [8] Dremen *v.* Stifle, 8 Wall. 595; [8] Hepburn *v.* Griswold, 8 Wall. 603; [2] Gut *v.* The State, 9 Wall. 35; [8] Railroad Company *v.* McClure, 10 Wall. 511; [8] Parker *v.* Davis, 12 Wall. 457; [8] Curtis *v.* Whiting, 13 Wall. 68; [8] Pennsylvania College Cases, 13 Wall. 190; [8] Wilmington R. R. *v.* Reid, sheriff, 13 Wall. 264; [8] Salt Company *v.* East Saginaw, 13 Wall. 373; [8] White *v.* Hart, 13 Wall. 646; [8] Osborn *v.* Nicholson et al., 13 Wall. 654; [8] Railroad Company *v.* Johnson, 15 Wall. 195; [8] Case of the State Tax on Foreign-held Bonds, 15 Wall. 300; [8] Tomlinson *v.* Jessup, 15 Wall. 454; [8] Tomlinson *v.* Branch, 15 Wall. 460; [8] Miller *v.* The State, 15 Wall. 478; [8] Holyoke Company *v.* Lyman, 15 Wall. 500; [8] Gunn *v.* Barry, 15 Wall. 610; [8] Humphrey *v.* Pegues, 16 Wall. 244; [8] Walker *v.* Whitehead, 16 Wall. 314; [8] Sohn *v.* Waterson, 17 Wall. 596; [8] Barings *v.* Dabney, 19 Wall. 1; [8] Head *v.* The University, 19 Wall. 526; [8] Pacific R. R. Co. *v.* Maguire, 20 Wall. 36; [8] Garrison *v.* The City of New York, 21 Wall. 196; [8] Ochiltree *v.* The Railroad Company, 21 Wall. 249; [8] Wilmington, &c., Railroad *v.* King, ex., 91 U. S. 3; [8] County of Moultrie *v.* Rockingham Ten Cent Savings Bank, 92 U. S. 631; [8] Home Insurance Company *v.* City Council of Augusta, 93 U. S. 116;

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[8] West Wisconsin R. R. Co. *v.* Supervisors, 93 U. S. 595; Murray *v.* Charleston, 96 U. S. 432; Edwards *v.* Kearzey, 96 U. S. 595; Keith *v.* Clark, 97 U. S. 454; Railroad Co. *v.* Georgia, 98 U. S. 359; Railroad Co. *v.* Tennessee, 101 U. S. 337; Wright *v.* Nagle, 101 U. S. 791; Stone *v.* Mississippi, 101 U. S. 814; Railroad Co. *v.* Alabama, 101 U. S. 832; Louisiana *v.* New Orleans, 101 U. S. 203; Hall *v.* Wisconsin, 103 U. S. 5; Pennyman's Case, 103 U. S. 714; Guaranty Co. *v.* Board of Liquidation, 105 U. S. 622; Greenwood *v.* Freight Co., 105 U. S. 13; Kring *v.* Missouri, 107 U. S. 221; Louisiana 7. New Orleans, 109 U. S. 285; Gilfillan *v.* Union Canal Co., 109 U. S. 401; Nelson *v.* St. Martin's Parish, 111 U. S. 716; Chic. Life Ins. Co. *v.* Needles, 113 U. S. 574; Virginia Coupon Cases, 114 U. S. 270; Amy *v.* Shelby Co., 114 U. S. 387; Effinger *v.* Kenney, 115 U. S. 566; N. Orleans Gas Co. *v.* La. Light Co., 115 U. S. 650; N. Orleans Water Works *v.* Rivers, 115 U. S. 674; Louisville Gas Co. *v.* Citizens' Gas Co., 115 U. S. 683; Fisk *v.* Jefferson Police Jury, 116 U. S. 131; Stone *v.* Farmers' Loan and Trust Co., 116 U. S. 307; Stone *v.* Ill. Central R. R. Co., 116 U. S. 347; Royall *v.* Virginia, 116 U. S. 572; St. Tammany Water Works *v.* N. Orleans Water Works, 120 U. S. 64; Church *v.* Kelsey, 121 U. S. 282; Lehigh Water Co. *v.* Easton, 121 U. S. 388; Seibert *v.* Lewis, 122 U. S. 284; N. Orleans Water Works *v.* La. Sugar Ref. Co., 125 U. S. 18; Maynard *v.* Hill, 125 U. S. 140; Jaehne *v.* N. Y., 128 U. S. 189; Denny *v.* Bennett, 128 U. S. 489; Chinese Ex. Case, 130 U. S. 588; Williamson *v.* N. J., 130 U. S. 189; Hunt *v.* Hunt, 131 U. S. clxv; Freeland *v.* Williams, 131 U. S. 405; Campbell *v.* Wade, 134 U. S. 34; Penna. R. Rd. Co. *v.* Miller, 134 U. S. 75; Hans *v.* Louisiana, 134 U. S. 1; North Carolina *v.* Temple, 134 U. S. 22; Crenshaw *v.* U. S., 134 U. S. 99; Louisiana ex rel. The N. Y. Guaranty and Indemnity Co. *v.* Steele, 134 U. S. 280; Minneapolis Easton Rwy. Co. *v.* Minnesota, 134 U. S. 467; Hill *v.* Merchants' Ins. Co., 134 U. S. 515; Medley, petitioner, 134 U. S. 160; Cherokee Nation *v.* Kansas Ry. Co., 641; Virginia Coupon Cases, 135 U. S. 662; Mormon Church *v.* U. S., 136 U. S. 1; Wheeler *v.* Jackson, 137 U. S. 245; Holden *v.* Minnesota, 137 U. S. 483; Sioux City Street Railway Co. *v.* Sioux City, 138 U. S. 98; Cook *v.* U. S., 138 U. S. 157; Belmont Bridge Co. *v.* Wheeling Bridge Co., 138 U. S. 287; Cook County *v.* Calumet and Chicago Canal Co., 138 U. S. 635; Pennoyer *v.* McConnaughy, 139 U. S. 1; Scotland County Court *v.* Hill, 139 U. S. 41; Scott *v.* Neely, 139 U. S. 106; Essex Public Road Board *v.* Shinkle, 140 U. S. 334; Stein *v.* Bienville Water Supply Co., 141 U. S. 67; Henderson Bridge Co. *v.* Henderson, 141 U. S. 679; New Orleans *v.* N. O. Water W'ks, 142 U. S. 79; Pacific Ex. Co. *v.* Seibert, 142 U. S. 339; N. O. City & Lake R. Rd. Co. *v.* New Orleans, 143 U. S. 193; Winona & St. Peter R. Rd. Co. *v.* Plainview, 143 U. S. 371; Louis-

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ville Water Co. *v.* Clark, 143 U. S. 1; N. Y. *v.* Squire, 145 U. S. 175; Brown *v.* Smart, 145 U. S. 454; Baker's Exrs. *v.* Kilgore, 145 U. S. 487; Morley *v.* Lake Shore & Mich. Southern Ry. Co., 146 U. S. 162; Hamilton, Ga. Ltd. Coke Co. *v.* Hamilton, 146 U. S. 258; Wilmington & Weldon R. Rd. Co. *v.* Alsbrook, 146 U. S. 279; Butler *v.* Gorley, 146 U. S. 303; Ills. Cent. R. R. *v.* Ills., 146 U. S. 387; Morley *v.* Lake Shore & Mich. So. Rwy. Co., 146 U. S. 162; Hamilton Gas L't Co. *v.* Hamilton City, 146 U. S. 258; Wil. & Wel. R. R. Co. *v.* Alsbrook, 146 U. S. 279; Ill. Cent. R. Rd. Co. *v.* Illinois, 146 U. S. 387; Bier *v.* McGehee, 148 U. S. 137; Schurz *v.* Cook, 148 U. S. 397; Eustis *v.* Bolles, 150 U. S. 361; Duncan *v.* Missouri, 152 U. S. 377; Israel *v.* Arthur, 152 U. S. 355; New Orleans *v.* Benjamin, 153 U. S. 411; Eagle Ins. Co. *v.* Ohio, 153 U. S. 446; Erie R. Rd. *v* Penna., 153 U. S. 628; Mobile & Ohio R. Rd. *v.* Tenn. 153 U. S. 486; Pittsburgh & So. Coal Co. *v.* La., 156 U. S. 590; U. S. ex rel. Siegel *v.* Thoman, 156 U. S. 353; City and Lake R. Rd. *v.* N. O., 157 U. S. 219; Central Land Co. *v.* Laidley, 159 U. S. 103; Winona & St. Peter Land Co. *v.* Minn., 159 U. S. 528.

[2] No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

McCulloch *v.* State of Maryland, 4 Wh. 316; Gibbons *v.* Ogden, 9 Wh. 1; Brown *v.* The State of Maryland, 12 Wh. 419; Mager *v.* Grima et al., 8 How. 490; Cooley *v.* Board of Wardens of Port of Philadelphia et al., 12 How. 299; Almy *v.* State of California, 24 How. 169; License Tax Cases, 5 Wall. 462; Crandall *v.* State of Nevada, 6 Wall. 35; Waring *v.* The Mayor, 8 Wall. 110; Woodruff *v.* Perham, 8 Wall. 123; Hinson *v.* Lott, 8 Wall. 148; State Tonnage Tax Cases, 12 Wall. 204; State Tax on Railway Gross Receipts, 15 Wall. 284; Inman Steamship Company *v.* Tinker, 94 U. S. 238; Cook *v.* Pennsylvania, 97 U. S. 566; Packet Co. *v.* Keokuk, 95 U. S. 80; People *v.* Compagnie Générale Transatlantique, 107 U. S. 59; Brown *v.* Houston, 114 U. S. 622; Pittsburgh & So. Coal Co. *v.* Bates, 156 U. S. 577; Pittsburgh & So. Coal Co. *v.* La., 156 U. S. 590.

[3] No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Green *v.* Biddle, 8 Wh. 1; Poole et al. *v.* The Lessee of Fleeger et al., 11 Pet. 185; Cooley *v.* Board of Wardens of Port of Philadelphia et al., 12 How. 299; Peete *v.* Morgan, 19 Wall. 581; Cannon *v.* New Orleans, 20 Wall. 577; Inman

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Steamship Company *v.* Tinker, 94 U. S. 238; Packet Co. *v.* St. Louis, 100 U. S. 423; Packet Co. *v.* Keokuk, 95 U. S. 80; Vicksburg *v.* Tobin, 100 U. S. 430; Packet Co. *v.* Catlettsburg, 105 U. S. 559; Morgan Steamship Company *v.* Louisiana Board of Health, 118 U. S. 455; Ouachita Packet Co. *v.* Aiken, 121 U. S. 444; Huse *v.* Glover, 119 U. S. 543; Harmon *v.* Chicago, 147 U. S. 396; Va. *v.* Tenn., 148 U. S. 503; Wharton *v.* Wise, 153 U. S. 155.

ARTICLE II.

SECTION I. [1] The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected as follows

[2] Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

Chisholm, ex., *v.* Georgia, 2 Dall. 419; Leitensdorfer et al. *v.* Webb, 20 How. 176; Ex parte Siebold, 100 U. S. 271; McPherson *v.* Blacker, 146 U. S. 1.

[* The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse, by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.]

* This clause, within brackets, has been superseded by the XIIth Amendment. See p

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[3] The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

[4] No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

English *v.* The Trustees of the Sailors' Snug Harbor, 3 Pet. 99.

[5] In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

[6] The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Pollock *v.* Farmers' Loan & Trust Co. 157 U. S. 429.

[7] Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—

"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SEC. II. [1] The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

United States *v.* Wilson, 7 Pet. 150; Ex parte William Wells, 18 How. 307; Ex parte Garland, 4 Wall. 333; Armstrong's Foundry, 6 Wall. 766; The Grape Shot, 9 Wall. 129; United States *v.* Padelford, 9 Wall. 542; United States *v.* Klein, 13 Wall. 128; Armstrong *v.* The United States, 13 Wall. 156; Pargoud *v.* The United States, 13 Wall. 156; Hamilton *v.* Dillin, 21 Wall. 73; Mechanics and Traders' Bank *v.* Union Bank, 22 Wall. 276: Lamar, ex., *v.* Browne et al., 92 U. S. 187; Wallach et al. *v.* Van Riswick, 92 U. S. 202.

[2] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice

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and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Ware *v.* Hylton et al., 3 Dall. 199; Marbury *v.* Madison, 1 Cr. 137; United States *v.* Kirkpatrick, 9 Wh. 720; American Insurance Company *v.* Canter (356 bales cotton), 1 Pet. 511; Foster and Elam *v.* Neilson, 2 Pet. 253; Cherokee Nation *v.* State of Georgia, 5 Pet. 1; Patterson *v.* Gwinn et al., 5 Pet. 233; Worcester *v.* State of Georgia, 6 Pet. 515; City of New Orleans *v.* De Armas et al., 9 Pet. 224; Holden *v.* Joy, 17 Wall. 211; Geofroy *v.* Riggs, 133 U. S. 258; Homer *v.* U. S., 143 U. S. 570; Shoemaker *v.* U. S., 147 U. S. 282.

* The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

The United States *v.* Kirkpatrick et al., 9 Wh. 720.

SEC. III. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Marbury *v.* Madison, 1 Cr. 137; Kendall, Postmaster General, *v.* The United States, 12 Pet. 524; Luther *v.* Borden, 7 How. 1; The State of Mississippi *v.* Johnson, President, 4 Wall. 475; Stewart *v.* Kahn, 11 Wall. 493; In re Neagle, 135 U. S. 1.

SEC. IV. The President, Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III.

SECTION I. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Chisholm, ex., *v.* Georgia, 2 Dall. 419; Stuart *v.* Laird, 1 Cr. 299; United States *v.* Peters, 5 Cr. 115; Cohens *v.* Virginia, 6 Wh. 264; Martin *v.* Hunter's Lessee, 1 Wh. 304;

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Osborn *v.* United States Bank, 9 Wh. 738; Benner et al. *v.* Porter, 9 How. 235; The United States *v.* Ritchie, 17 How. 525; Murray's Lessee et al. *v.* Hoboken Land and Improvement Company, 18 How. 272; Ex parte Vallandigham, 1 Wall. 243; Ames *v.* Kansas, 111 U. S. 449; In re Ross, 140 U. S. 453; McAllister *v.* U. S., 141 U. S. 174; Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429.

SEC. II. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.

Hayburn's Case (note), 2 Dall. 410; Chisholm, ex., *v.* Georgia, 2 Dall. 419: Glass et al. *v.* Sloop Betsey, 3 Dall. 6; United States *v.* La Vengeance, 3 Dall. 297; Hollingsworth et al. *v.* Virginia, 3 Dall. 378; Mossman, ex., *v.* Higginson, 4 Dall. 12; Marbury *v.* Madison, 1 Cr. 137; Hepburn et al. *v.* Ellzey, 2 Cr. 445; United States *v.* Moore, 3 Cr. 159; Strawbridge et al. *v.* Curtiss et al., 3 Cr. 267; Ex parte Bollman and Swartwout, 4 Cr. 75; Rose *v.* Himely, 4 Cr. 241: Chappedelaine et al. *v.* Dechenaux, 4 Cr. 305; Hope Insurance Company *v.* Boardman et al., 5 Cr. 57; Bank of United States *v.* Devaux et al., 5 Cr. 61; Hodgson et al. *v.* Bowerbank et al., 5 Cr. 303; Owings *v.* Norwood's Lessee, 5 Cr. 344; Duroüsseau *v.* The United States, 6 Cr. 307; United States *v.* Hudson and Goodwin, 7 Cr. 32; Martin *v.* Hunter, 1 Wh. 304: Colson et al. *v.* Lewis, 2 Wh. 377: United States *v.* Bevans, 3 Wh. 336; Cohens *v.* Virginia, 6 Wh. 264; Ex parte Kearney, 7 Wh. 38; Matthews *v.* Zane, 7 Wh. 164; Osborn *v.* United States Bank, 9 Wh. 738; United States *v.* Ortega, 11 Wh. 467; American Insurance Company *v.* Canter (356 bales cotton), 1 Pet. 511; Jackson *v.* Twentyman, 2 Pet. 136; Cherokee Nation *v.* State of Georgia, 5 Pet. 1; State of New Jersey *v.* State of New York, 5 Pet. 283; Davis *v.* Packard et al., 6 Pet. 41; United States *v.* Arredondo et al. 6 Pet. 691; Davis *v.* Packard et al., 7 Pet. 276; Breedlove et al. *v.* Nickolet et al., 7 Pet. 413; Brown *v.* Keene, 8 Pet. 112; Davis *v.* Packard et al., 8 Pet. 312; City of New Orleans *v.* De Armas et al., 9 Pet. 224; The State of Rhode Island *v.* The Commonwealth of Massachusetts, 12 Pet. 657; The Bank of Augusta *v.* Earle, 13 Pet. 519; The Commercial and Railroad Bank of Vicksburg *v.* Slocomb et al., 14 Pet. 60; Suydam et al. *v.* Broadnax, 14 Pet. 67; Prigg *v.* The Commonwealth of Pennsylvania, 16 Pet. 530; Louisville, Cincinnati and Charleston Railway Company *v.* Letson, 2 How. 497; Cary et al. *v.* Curtis, 3 How. 236;

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Warring *v.* Clark, 5 How. 441; Luther *v.* Borden, 7 How. 1; Sheldon et al. *v.* Sill, 8 How. 441; The Propeller Genesee Chief *v.* Fitzhugh et al., 12 How. 443; Fretz et al. *v.* Ball et al., 12 How. 476; Neves et al. *v.* Scott et al., 13 How. 268; State of Pennsylvania *v.* The Wheeling, etc. Bridge Company et al., 13 How. 518; Marshall *v.* The Baltimore and Ohio R. R. Co., 16 How. 314; The United States *v.* Guthrie, 17 How. 284; Smith *v.* State of Maryland, 18 How. 71; Jones et al. *v.* League, 18 How. 76; Murray's Lessee et al. *v.* Hoboken Land and Improvement Company, 18 How. 272; Hyde et al. *v.* Stone, 20 How. 170; Irvine *v.* Marshall et al., 20 How. 558; Fenn *v.* Holmes, 21 How. 481: Moorewood et al. *v.* Erequist, 23 How. 491; Commonwealth of Kentucky *v.* Dennison, governor, 24 How. 66; Ohio and Mississippi Railroad Company *v.* Wheeler, 1 Black 286; The Steamer St. Lawrence, 1 Black 522; The Propeller Commerce, 1 Black 574; Ex parte Vallandigham, 1 Wall. 243; Ex parte Milligan, 4 Wall. 1; The Moses Taylor, 4 Wall. 411; State of Mississippi *v.* Johnson, President, 4 Wall. 475; The Hine *v.* Trevor, 4 Wall. 555; City of Philadelphia *v.* The Collector, 5 Wall. 720; State of Georgia *v.* Stanton, 6 Wall. 50; Payne *v.* Hook, 7 Wall. 425; The Alicia, 7 Wall. 571; Ex parte Yerger, 8 Wall. 85; Insurance Company *v.* Dunham, 11 Wall. 1; Virginia *v.* West Virginia, 11 Wall. 39; Coal Company *v.* Blatchford, 11 Wall. 172; Railway Company *v.* Whitton's Adm., 13 Wall. 270; Tarble's Case, 13 Wall. 397; Blyew et al. *v.* The United States, 13 Wall. 581; Davis *v.* Gray, 16 Wall. 203; Case of the Sewing Machine Companies, 18 Wall. 353; Insurance Company *v.* Morse, 20 Wall. 445; Vannevar *v.* Bryant, 21 Wall. 41; The Lottawanna, 21 Wall. 558; Gaines *v.* Fuentes et al., 92 U. S. 10; Miller *v.* Dows, 94 U. S. 444; Doyle *v.* Continental Insurance Company, 94 U. S. 535; Tennessee *v.* Davis, 100 U. S. 257; Baldwin *v.* Franks, 120 U. S. 678; Barron *v.* Burnside, 121 U. S. 186; St. Louis, Iron Mountain and Southern Railway *v.* Vickers, 122 U. S. 360; Chinese Ex. Case, 130 U. S. 581; Brooks *v.* Missouri, 124 U. S. 394; New Orleans Water Works *v.* Louisiana Sugar Refining Co., 125 U. S. 18; Spencer *v.* Merchant, 125 U. S. 345; Dale Tile Mfg. Co. *v.* Hyatt, 125 U. S. 46; Felix *v.* Scharnweber, 125 U. S. 54; Hannibal and St. Joseph R. R. *v.* Missouri River Packet Co., 125 U. S. 260; Kreiger *v.* Shelby R. R. Co., 125 U. S. 39; Craig *v.* Leitensdorfer, 127 U. S. 764; Jones *v.* Craig, 127 U. S. 213; Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265; U. S. *v.* Beebe, 127 U. S. 338; Chinese Ex. Case, 130 U. S. 581; Lincoln County *v.* Luning, 133 U. S. 529; Christian *v.* Atlantic & N. C. R. Rd. Co., 133 U. S. 233; Hans *v.* Louisiana, 134 U. S. 1; Louisiana ex rel. The N. Y. Guaranty & Indemnity Co. *v.* Steele, 134 U. S. 280; Jones *v.* U. S., 137 U. S. 202; Manchester *v.* Mass., 139 U. S. 240; In re Ross, 140 U. S. 453; In re Garnett, 141 U. S. 1; U. S. *v.* Texas, 143 U. S. 621; Cooke *v.* Avery, 147

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U. S. 375; S. Pac. Co. *v.* Denton, 146 U. S. 202; Lawton *v.* Steele, 152 U. S. 133; Interstate Com. Comsn. *v.* Brinson, 154 U.S. 447.

[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Chisholm, ex., *v.* Georgia, 2 Dall. 419; Wiscart et al. *v.* Dauchy, 3 Dall. 321; Marbury *v.* Madison, 1 Cr. 137; Durousseau et al. *v.* United States, 6 Cr. 307; Martin *v.* Hunter's Lessee, 1 Wh. 304; Cohens *v.* Virginia, 6 Wh. 264; Ex parte Kearney, 7 Wh. 38; Wayman *v.* Southard, 10 Wh. 1; Bank of the United States *v.* Halstead, 10 Wh. 51; United States *v.* Ortega, 11 Wh. 467; The Cherokee Nation *v.* The State of Georgia, 5 Pet. 1; Ex parte Crane et als., 5 Pet. 189; The State of New Jersey *v.* The State of New York, 5 Pet. 283; Ex parte Sibbald *v.* United States, 12 Pet. 488; The State of Rhode Island *v.* The State of Massachusetts, 12 Pet. 657; State of Pennsylvania *v.* The Wheeling, etc., Bridge Company, 13 How. 518; In re Kaine, 14 How. 103; Ableman *v.* Booth and United States *v.* Booth, 21 How. 506; Freeborn *v.* Smith, 2 Wall. 160; Ex parte McCardle, 6 Wall. 318; Ex parte McCardle, 7 Wall. 506; Ex parte Yerger, 8 Wall. 85; The Lucy, 8 Wall. 307; The Justices *v.* Murray, 9 Wall. 274; Pennsylvania *v.* Quicksilver Company, 10 Wall. 553; Murdock *v.* City of Memphis, 20 Wall. 590; Börs *v.* Preston, 111 U. S. 252; Ames *v.* Kansas, 111 U. S. 449; Clough *v.* Curtis, 134 U. S. 361; In re Neagle, 135 U. S. 1; Mobile & Ohio R. Rd. *v.* Tenn., 153 U. S. 486.

[3] The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Ex parte Milligan, 4 Wall. 2; Ellenbecker *v.* Plymouth County, 134 U. S. 31; Cook *v.* U. S., 138 U. S. 157; In re Ross, 140 U. S. 453.

SEC. III. [1] Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

United States *v.* The Insurgents, 2 Dall. 335; United States *v.* Mitchell, 2 Dall. 348; Ex parte Bollman and Swartwout, 4 Cr. 75; United States *v.* Aaron Burr, 4 Cr. 469.

[2] The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

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Bigelow *v.* Forest, 9 Wall. 339; Day *v.* Micou, 18 Wall. 156; Ex parte Lange, 18 Wall. 163; Wallach et al. *v.* Van Riswick, 92 U. S. 202.

ARTICLE IV.

SECTION I. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Mills *v.* Duryee, 7 Cr. 481; Hampton *v.* McConnel, 3 Wh. 234; Mayhew *v.* Thatcher, 6 Wh. 129; Darby's Lessee *v.* Mayer, 10 Wh. 465; The United States *v.* Amedy, 11 Wh. 392; Caldwell et al. *v.* Carrington's Heirs, 9 Pet. 86; M'Elmoyle *v.* Cohen, 13 Pet. 312; The Bank of Augusta *v.* Earle, 13 Pet. 519; Bank of the State of Alabama *v.* Dalton, 9 How. 522; D'Arcy *v.* Ketchum, 11 How. 165; Christmas *v.* Russell, 5 Wall, 290; Green *v.* Van Buskirk, 7 Wall. 139; Paul *v.* Virginia, 8 Wall. 168; Board of Public Works *v.* Columbia College, 17 Wall. 521; Thompson *v.* Whitman, 18 Wall. 457; Bonaparte *v.* Tax Court, 104 U. S. 592; Hanley *v.* Donoghue, 116 U. S. 1; Renaud *v.* Abbott, 116 U. S. 277; Chic. and Alton R. R. *v.* Wiggins Ferry Co., 119 U. S. 615; Cole *v.* Cunningham, 133 U. S. 107; Blount *v.* Walker, 134 U. S. 607; Texas & Pacific Ry. Co. *v.* Southern Pacific Co., 137 U. S. 48; Simmons *v.* Saul, 138 U. S. 439; Reynolds *v.* Stockton, 140 U. S. 254; Carpenter *v.* Strange, 141 U. S. 87; Glenn *v.* Garth, 147 U. S. 360; Huntington *v.* Allril, 146 U. S. 657.

SEC. II. [1] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Bank of United States *v.* Devereux. 5 Cr. 61; Gassies *v.* Ballou, 6 Pet. 761; The State of Rhode Island *v.* The Commonwealth of Massachusetts, 12 Pet. 657; The Bank of Augusta *v.* Earle, 13 Pet. 519; Moore *v.* The People of the State of Illinois, 14 How. 13; Conner et al. *v.* Elliot et al., 18 How. 591; Dred Scott *v.* Sanford, 19 How. 393; Crandall *v.* State of Nevada, 6 Wall. 35; Woodruff *v.* Parham, 8 Wall. 123; Paul *v.* Virginia, 8 Wall. 168; Downham *v.* Alexandria Council, 10 Wall. 173; Liverpool Insurance Company *v.* Massachusetts, 10 Wall. 566; Ward *v.* Maryland, 12 Wall. 418; Slaughterhouse Cases, 16 Wall. 36; Bradwell *v.* The State, 16 Wall. 130; Chemung Bank *v.* Lowery. 93 U. S. 72; McCready *v.* Virginia, 94 U. S. 391; Brown *v.* Houston, 114 U. S. 622; Pembina Mining Co. *v.* Penna., 125 U. S. 181; Kimmish *v.* Ball, 129 U. S. 217; Cole *v.* Cunningham, 133 U. S. 107; Leisy *v.* Hardin, 135 U. S. 100; Minnesota *v.* Barber, 136 U. S. 313; McKane *v.* Durston, 153 U. S. 684; Pittsburgh & So. Coal Co. *v.* Bates, 156 U. S. 577.

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[2] A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

Holmes *v.* Jennison et al., 14 Pet. 540; Commonwealth of Kentucky *v.* Dennison, governor, 24 How. 66; Taylor *v.* Tainter, 16 Wall. 366; Lascelles *v.* Georgia, 148 U. S. 537; Pearce *v.* Texas, 155 U. S. 311.

[3] No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Prigg *v.* The Commonwealth of Pennsylvania, 16 Pet. 539; Jones *v.* Van Zandt, 5 How. 215; Strader et al. *v.* Graham, 10 How. 82; Moore *v.* The People of the State of Illinois, 14 How. 13; Dred Scott *v.* Sanford, 19 How. 393; Ableman *v.* Booth and United States *v.* Booth, 21 How. 506; Callan *v.* Wilson, 127 U. S. 540; Nashville, Chattanooga, etc. Rwy. *v.* Alabama, 128 U. S. 96.

SEC. III. [1] New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

American Insurance Company et al. *v.* Canter (356 bales cotton), 1 Pet. 511; Pollard's Lessee *v.* Hagan, 3 How. 212; Cross et al. *v.* Harrison, 16 How. 164.

[2] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

McCulloch *v.* State of Maryland, 4 Wh. 316; American Insurance Company *v.* Canter, 1 Pet. 511; United States *v.* Gratiot et al., 14 Pet. 526; United States *v.* Rogers, 4 How. 567; Cross et al. *v.* Harrison, 16 How. 164; Muckey et al. *v.* Coxe, 18 How. 100; Gibson *v.* Chouteau, 13 Wall. 92; Clinton *v.* Englebert, 13 Wall. 434; Beall *v.* New Mexico, 16 Wall. 535; Davis *v.* Beason, 133 U. S. 333; Wisconsin Central R. Rd. Co. *v.* Price County, 133 U. S. 496; Cope *v.* Cope, 137 U. S. 682; Mormon Church *v.* U. S., 136 U. S. 1.

SEC. IV. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Luther *v.* Borden, 7 How. 1; Texas *v.* White, 7 Wall. 700.

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ARTICLE V.

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate.

Hollingsworth et al. *v.* Virginia, 3 Dall. 378.

ARTICLE VI.

[1] All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

[2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Hayburn's Case, 2 Dall. 409; Ware *v.* Hilton, 3 Dall. 199; Calder and Wife *v.* Bull and Wife, 3 Dall. 386; Marbury *v.* Madison, 1 Cr. 137; Chirac *v.* Chirac, 2 Wh. 259; McCulloch *v.* The State of Maryland, 4 Wh. 316; Society *v.* New Haven, 8 Wh. 464; Gibbons *v.* Ogden, 9 Wh. 1; Foster and Elam *v.* Neilson, 2 Pet. 253; Buckner *v.* Finley, 2 Pet. 586; Worcester *v.* State of Georgia, 6 Pet. 515; Kennett et al. *v.* Chambers, 14 How. 38; Lodge *v.* Woolsey, 18 How. 331; State of New York *v.* Dibble, 21 How. 366; Ableman *v.* Booth and United States *v.* Booth, 21 How. 506; Sinnot *v.* Davenport, 22 How. 227; Foster *v.* Davenport, 22 How. 244; Haver *v.* Yaker, 9 Wall. 32; Whitney *v.* Robertson, 124 U. S. 190; In re Neagle, 135 U. S. 1; Cherokee Nation *v.* Kansas Ry. Co., 135 U. S. 641; Cook Co. *v.* Calumet & Chicago Canal Co., 138 U. S. 635; Gulf, Colorado & Santa Fé Rwy. Co. *v.* Hefley, 158 U. S. 98; In re Quarles *v.* Butler, 158 U. S. 532.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Ex parte Garland, 4 Wall. 333; Davis *v.* Beason, 133 U. S. 333.

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ARTICLE VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty-seven and of the Independance of the United States of America the Twelfth IN WITNESS whereof We have hereunto subscribed our Names, GO. WASHINGTON,

Presidt and deputy from Virginia.

NEW HAMPSHIRE.
John Langdon,
Nicholas Gilman.

MASSACHUSETTS.
Nathaniel Gorham,
Rufus King.

CONNECTICUT.
Wm Saml Johnson,
Roger Sherman.

NEW YORK.
Alexander Hamilton.

NEW JERSEY.
Wil: Livingston,
David Brearley,
Wm Paterson,
Jona: Dayton.

PENNSYLVANIA.
B Franklin,
Thomas Mifflin,
Robt Morris,
Geo. Clymer,
Thos Fitzsimons,
Jared Ingersoll,
James Wilson,
Gouv Morris.

DELAWARE.
Geo: Read,
Gunning Bedford jun,
John Dickinson,
Richard Bassett,
Jaco: Broom.

MARYLAND.
James McHenry,
Dan of St Thos Jenifer,
Danl Carroll.

VIRGINIA.
John Blair,
James Madison Jr.

NORTH CAROLINA.
Wm Blount,
Richd Dobbs Spaight,
Hu Williamson.

SOUTH CAROLINA.
J. Rutledge,
Charles Cotesworth Pinckney,
Charles Pinckney,
Pierce Butler.

GEORGIA.
William Few,
Abr Baldwin.

Attest WILLIAM JACKSON *Secretary.*

AMENDMENTS TO CONSTITUTION.

Articles in addition to and Amendment Of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the Fifth Article of the original Constitution.

Ellenbecker *v.* Plymouth County, 134 U. S. 3.

ARTICLE I.*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the

* The first ten amendments to the Constitution of the United States were proposed to the legislatures of the several States by the First Con-

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freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Terret et al. *v.* Taylor et al., 9 Cr. 43; Vidal et al. *v.* Girard et al., 2 How. 127; Ex parte Garland, 4 Wall. 333; United States *v.* Cruikshank et al., 92 U. S. 542; Reynolds *v.* United States, 98 U. S. 145; Davis *v.* Beason, 133 U. S. 333; In re Rapier, 143 U. S. 110; Homer *v.* U. S., 143 U. S. 192.

ARTICLE II.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Presser *v.* Illinois, 116 U. S. 252.

ARTICLE III.

No Soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Smith *v.* State of Maryland, 18 How. 71; Murray's Lessee et al. *v.* Hoboken Land and Improvement Company, 18 How. 272; Ex parte Milligan, 4 Wall. 2; Boyd *v.* United States, 116 U. S. 616; Fong Yuen Ting *v.* U. S., 149 U. S. 698.

ARTICLE V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any

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gress, on the 25th of September, 1789. They were ratified by the following States, and the notification of ratification by the governors thereof were successively communicated by the President to Congress: New Jersey, November 20, 1789; Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; New Hampshire, January 25, 1790; Delaware, January 28, 1790; Pennsylvania, March 10, 1790; New York, March 27, 1790; Rhode Island, June 15, 1790; Vermont, November 3, 1791; and Virginia, December 15, 1791. There is no evidence on the journals of Congress that the legislatures of Connecticut, Georgia, and Massachusetts ratified them.

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criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States *v.* Perez, 9 Wh. 579; Barron *v.* The City of Baltimore, 7 Pet. 243; Fox *v.* Ohio, 5 How. 410; West River Bridge Company *v.* Dix et al., 6 How. 507; Mitchell *v.* Harmony, 13 How. 115; Moore, ex., *v.* The People of the State of Illinois, 14 How. 13; Murray's Lessee et al., *v.* Hoboken Land and Improvement Company, 18 How. 272; Dynes *v.* Hoover, 20 How. 65; Withers *v.* Buckley et al., 20 How. 84; Gilman *v.* The City of Sheboygan, 2 Black 510; Ex parte Milligan, 4 Wall. 2; Twitchell *v.* The Commonwealth, 7 Wall. 321; Hepburn *v.* Griswold, 8 Wall. 603; Miller *v.* United States, 11 Wall. 268; Legal Tender Cases, 12 Wall. 457; Pumpelly *v.* Green Bay Company, 13 Wall. 166; Osborn *v.* Nicholson, 13 Wall. 654; Ex parte Lange, 18 Wall. 163; Kohl et al. *v.* United States, 91 U. S. 367; Cole *v.* La Grange, 113 U. S. 1; Ex parte Wilson, 114 U. S. 417; Brown *v.* Grant, 116 U. S. 207; Boyd *v.* United States, 116 U. S. 616; Makin *v.* United States, 117 U. S. 348; Ex parte Bain, 121 U. S. 1; Parkinson *v.* United States, 121 U. S. 281; Spies [redacted] Illinois, 123 U. S. 131; Sands *v.* Manistee River Improvement Company, 123 U. S. 288; Mugler *v.* Kansas, 123 U. S. 623; Great Falls Manufacturing Company *v.* The Attorney General, 124 U. S. 581; United States *v.* De Walt, 128 U. S. 393; Huling *v.* Kaw Valley Railway and Improvement Company, 130 U. S. 559; Freeland *v.* Williams, 131 U. S. 405; Cross *v.* North Carolina, 132 U. S. 131; Manning *v.* French, 133 U. S. 186; Searle *v.* School Dist. No. 2, 133 U. S. 553; Palmer *v.* McMahon, 133 U. S. 660; Ellenbecker *v.* Plymouth County, 134 U. S. 31; Chic. Mil. & St. Paul Rwy. Co. *v.* Minnesota, 134 U. S. 418; Wheeler *v.* Jackson, 137 U. S. 245; Holden *v.* Minnesota, 137 U. S. 245; Caldwell *v.* Texas, 137 U. S. 692; Cherokee Nation *v.* Kansas Ry. Co. 135 U. S. 641; Kaukauna Water Power Co. *v.* Miss. Canal Co., 142 U. S. 254; New Orleans *v.* N. O. Water W'ks, 142 U. S. 79; Counselman *v.* Hitchcock, 142 U. S. 547; Simmonds *v.* U. S., 142 U. S. 148; Horn Silver Mining Co. *v.* N. Y., 143 U. S. 305; Hallinger *v.* Davis, 146 U. S. 314; Shoemaker *v.* U. S., 147 U. S. 282; Thorington *v.* Montgomery, 147 U. S. 490; Yesler *v.* Wash'n Harbor Line Coms'rs, 146 U. S. 646; Monongahela Nav. Co. *v.* U. S. 148 U. S. 312; Fong Yuen Ting *v.* U. S., 149 U. S. 698; In re Lennon, 150 U. S. 393; Pitts. C. C. & St. L. Rwy. Co. *v.* Backus, 154 U. S. 421; Interstate Com. Comsn. *v.* Brimson, 154 U. S. 447; Pearce *v.* Texas, 155 U. S. 311; Linford *v.* Ellison, 155 U. S. 503; Andrews *v.* Swartz, 156 U. S. 272; Pittsburgh & Southern Coal Co. *v.* La., 156 U. S. 590; St. L. & S. F. Rwy. Co. *v.* Gill, 156 U. S. 649; Johnson *v.* Sayre, 158 U. S. 109; Sweet *v.* Rechel, 159 U. S. 380.

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ARTICLE VI.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States *v.* Cooledge, 1 Wh. 415; Ex parte Kearney, 7 Wh. 38; United States *v.* Mills, 7 Pet. 142; Barron *v.* City of Baltimore, 7 Pet. 243; Fox *v.* Ohio, 5 How. 410; Withers *v.* Buckley et al., 20 How. 84; Ex parte Milligan, 4 Wall. 2; Twitchell *v.* The Commonwealth, 7 Wall. 321; Miller *v.* The United States, 11 Wall. 268; United States *v.* Cook, 17 Wall. 168; United States *v.* Cruikshank et al., 92 U. S. 542; Spies *v.* Illinois, 123 U. S. 131: Ellenbecker *v.* Plymouth Co., 134 U. S. 31; Jones *v.* U. S., 137 U. S. 202; Cook *v.* U. S., 138 U. S. 157; In re Ross, 140 U. S. 453; Hallinger *v.* Davis, 146 U. S. 314; Mattox *v.* U. S., 156 U. S. 237; Bergemann *v.* Becker, 157 U. S. 655.

ARTICLE VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

United States *v.* La Vengeance, 3 Dall. 297; Bank of Columbia *v.* Oakley, 4 Wh. 235; Parsons *v.* Bedford et al., 3 Pet. 433; Lessee of Livingston *v.* Moore et al., 7 Pet. 469; Webster *v.* Reid, 11 How. 437; State of Pennsylvania *v.* The Wheeling &c. Bridge Company et al., 13 How. 518; The Justices *v.* Murray, 9 Wall. 274; Edwards *v.* Elliott et al., 21 Wall. 532; Pearson *v.* Yewdall, 95 U. S. 294; McElrath *v.* United States, 102 U. S. 426; Callan *v.* Wilson, 127 U. S. 540; Ark. Valley Land and Cattle Co. *v.* Mann, 130 U. S. 69; Whitehead *v.* Shattuck, 138 U. S. 146; Scott *v.* Neely, 140 U. S. 106; Cates *v.* Allen, 149 U. S. 451.

ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Pervear *v.* Commonwealth, 5 Wall. 475; Manning *v.* French, 133 U. S. 186; Ellenbecker *v.* Plymouth County, 134 U. S. 31; In re Kemmler, 136 U. S. 436; McElvaine *v.* Brush, 142 U. S. 155; O'Neill *v.* Vermont, 144 U. S. 323.

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ARTICLE IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Lessee of Livingston *v.* Moore et al., 7 Pet. 469.

ARTICLE X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Chisholm, ex., *v.* State of Georgia, 2 Dall. 419; Hollingsworth et al. *v.* The State of Virginia, 3 Dall. 378; Martin *v.* Hunter's Lessee, 1 Wh. 304; McCulloch *v.* State of Maryland, 4 Wh. 316; Anderson *v.* Dunn, 6 Wh. 204; Cohens *v.* Virginia, 6 Wh. 264; Osborn *v.* United States Bank, 9 Wh. 738; Buchler *v.* Finley, 2 Pet. 586; Ableman *v.* Booth, 21 How. 506; The Collector *v.* Day, 11 Wall. 113; Claflin *v.* Houseman, assignee, 93 U. S. 130; Inman Steamship Company *v.* Tinker, 94 U. S. 238; Church *v.* Kelsey, 121 U. S. 282; Ouachita Packet Co. *v.* Aiken, 121 U. S. 444; W. U. Tel. Co. *v.* Pendleton, 122 U. S. 347; Bowman *v.* Chicago, and Northwestern Ry. Co., 125 U. S. 465; Mahon *v.* Justice, 127 U. S. 700; Leisy *v.* Hardin, 135 U. S. 100; Manchester *v.* Mass., 139 U. S. 240; Pollock *v.* Farmers' Loan & Trust Co. 157 U. S. 429.

ARTICLE XI.*

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or subjects of any Foreign State.

State of Georgia *v.* Brailsford et al., 2 Dall. 402; Chisholm, ex. *v.* State of Georgia, 2 Dall. 419; Hollingsworth et al., *v.* Virginia, 3 Dall. 378; Cohens *v.* Virginia, 6 Wh. 264; Osborn *v.* United States Bank, 9 Wh. 738; United States *v.* The Planters' Bank, 9 Wh. 904; The Governor of Georgia *v.* Juan Madrazo, 1 Pet. 110; Cherokee Nation *v.* State of Georgia, 5 Pet. 1; Briscoe *v.* The Bank of the Commonwealth of Kentucky, 11 Pet. 257; Curran *v.* State of Arkansas et al., 15 How. 304; New Hampshire *v.* Louisiana, 108 U. S. 76; Virginia Coupon Cases, 114 U. S. 270; Hagood *v.* Southern, 117 U. S. 52; In re Ayres, 123 U. S. 443; Lincoln County *v.* Luning, 133 U. S. 529; Coupon Cases, 135 U. S. 662; Pennoyer *v.* McConnaughy, 140 U. S. 1; In re Taylor, 149 U S. 164; Reagan *v.* Farmers' Loan and Trust Co., 154 U. S. 362; Reagan *v.* Mercantile Trust Co., 154 U. S. 413.

* The eleventh amendment to the constitution of the United States was proposed to the legislatures of the several states by the Third Congress, on the 5th of March, 1794; and was declared in a message from the President to Congress, dated the 8th of January, 1798, to have been ratified by the legislatures of three-fourths of the states.

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ARTICLE XII.*

The Electors shall meet in their respective states, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice President, shall be the Vice President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President, shall be eligible to that of Vice President of the United States.

ARTICLE XIII.†

SECTION I. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly

* The twelfth amendment to the constitution of the United States was proposed to the legislatures of the several states by the Eighth Congress, on the 12th of December, 1803, in lieu of the original third paragraph of the first section of the second article; and was declared in a proclamation of the Secretary of State, dated the 25th of September, 1804, to have been ratified by the legislatures of three-fourths of the states.

† The thirteenth amendment to the constitution of the United States was proposed to the legislatures of the several states by the Thirty-eighth Congress, on the 1st of February, 1865, and was declared in a proclama-

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convicted, shall exist within the United States, or any place subject to their jurisdiction.

SEC. II. Congress shall have power to enforce this article by appropriate legislation.

Dred Scott *v.* Sanford, 19 How. 393; White *v.* Hart, 13 Wall. 646; Osborn *v.* Nicholson, 13 Wall. 654; Slaughter-house Cases, 16 Wall. 36; Ex parte Virginia, 100 U. S. 339; Civil Rights Case, 109 U. S. 3.

ARTICLE XIV.*

SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immuni-

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tion of the Secretary of State, dated the 18th of December, 1865, to have been ratified by the legislatures of twenty-seven of the thirty-six states, viz.: Illinois, Rhode Island, Michigan, Maryland, New York, West Virginia, Maine, Kansas, Massachusetts, Pennsylvania, Virginia, Ohio, Missouri, Nevada, Indiana, Louisiana, Minnesota, Wisconsin, Vermont, Tennessee, Arkansas, Connecticut, New Hampshire, South Carolina, Alabama, North Carolina, and Georgia.

* The fourteenth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Thirty-ninth Congress, on the 16th of June, 1866. On the 21st of July, 1868, Congress adopted and transmitted to the Department of State a concurrent resolution declaring that "the legislatures of the States of Connecticut, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, New Hampshire, Massachusetts, Nebraska, Iowa, Arkansas, Florida, North Carolina, Alabama, South Carolina, and Louisiana, being three-fourths and more of the several States of the Union, have ratified the fourteenth article of amendment to the Constitution of the United States, duly proposed by two-thirds of each House of the Thirty-ninth Congress: Therefore *Resolved*, That said fourteenth article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State." The Secretary of State accordingly issued a proclamation, dated the 28th of July, 1868, declaring that the proposed fourteenth amendment had been ratified, in the manner hereafter mentioned, by the legislatures of thirty of the thirty-six States, viz.: Connecticut, June 30, 1866; New Hampshire, July 7, 1866; Tennessee, July 19, 1866; New Jersey, September 11, 1866 (and the legislature of the same State passed a resolution in April, 1868, to withdraw its consent to it); Oregon, September 19, 1866; Vermont, November 9, 1866; Georgia rejected it November 13, 1866, and ratified it July 21, 1868; North Carolina rejected it December 4, 1866, and ratified it July 4, 1868; South Carolina rejected it December 20, 1866, and ratified it July 9, 1868; New York ratified it January 10, 1867; Ohio ratified it January 11, 1867 (and the legislature of the same State passed a resolution in January, 1868, to withdraw its consent to it); Illinois ratified it January 15, 1867; West Virginia, January 16, 1867; Kansas, January 18, 1867; Maine, January 19, 1867; Nevada, January 22, 1867; Missouri, January 26, 1867; Indiana, January 20, 1867; Minne-

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ties of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Strauder *v.* West Virginia, 100 U. S. 303; Virginia *v.* Rivers, 100 U. S. 313; Ex parte Virginia, 100 U. S. 339; Missouri *v.* Lewis, 101 U. S. 22; Civil Rights Cases, 109 U. S. 3; Louisiana *v.* New Orleans, 109 U. S. 285; Hurtado *v.* California, 110 U. S. 516; Hagar *v.* Reclamation Dist., 111 U. S. 701; Elk *v.* Wilkins, 112 U. S. 94; Head *v.* Amoskeag Mfg. Co., 113 U. S. 9; Barbier *v.* Connolly, 113 U. S. 27; Provident Institution *v.* Jersey City, 113 U. S. 506; Soon Hing *v.* Crowley, 113 U. S. 703; Wurts *v.* Hoagland, 114 U. S. 606; Ky. R. Rd. Tax Cases, 115 U. S. 321; Campbell *v.* Holt, 115 U. S. 620; Presser *v.* Illinois, 116 U. S. 252; Stone *v.* Farmers' Loan and Trust Co., 116 U. S. 307; Arrowsmith *v.* Harmoning, 118 U. S. 194; Yick Wo *v.* Hopkins, 118 U. S. 356; Santa Clara Co. *v.* S. Pacific R. Rd., 118, U. S. 394; Phila. Fire Assn. *v.* N. Y., 119 U. S. 110; Schmidt *v.* Cobb, 119 U. S. 286; Baldwin *v.* Frank, 119 U. S. 678; Hayes *v.* Missouri, 120 U. S. 68; Church *v.* Kelsey, 121 U. S. 282; Pembina Mining Co. *v.* Penna., 125 U. S. 181; Spencer *v.* Merchant, 125 U. S. 345; Dow *v.* Beidelman, 125 U. S. 680; Bank of Redemption *v.* Boston, 125 U. S. 60; Ro Bards *v.* Lamb, 127 U. S. 58; Mo. Pac. Rwy. Co. *v.* Mackey, 127 U. S. 205; Minneapolis and St. Louis Rwy. *v.* Herrick, 127 U. S. 210; Powell *v.* Penna., 127 U. S. 678; Kidd *v.* Pearson, 128 U. S. 1; Nashville, Chattanooga, &c., Rwy. *v.* Alabama, 128 U. S. 96; Walston *v.* Navin, 128 U. S. 578; Minneapolis and St. Louis Rwy. *v.* Beckwith, 129 U. S. 26; Dent *v.* West Va., 129 U. S. 114; Huling *v.* Kaw Valley Rwy. and Improvement Co., 130 U. S. 559; Freeland *v.* Williams, 131 U. S. 405; Cross *v.* North Carolina, 132 U. S. 131; Pennie *v.* Reis, 132 U. S. 464; Sugg *v.* Thornton, 132 U. S. 524; Davis *v.* Beason, 133 U. S. 333; Ellenbecker *v.* Plymouth Co., 134 U. S. 31; Bell Gap R. Rd. Co. *v.* Penna., 134 U. S. 232; Chicago, Milwaukee, and St. Paul Rwy. *v.* Minnesota, 134 U. S. 418; Home Ins. Co. *v.* N. Y., 134 U. S. 594; Louisville & Nashville R. Rd. Co. *v.* Woodson, 134 U. S. 614; Home Ins.

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sota, February 1, 1867; Rhode Island, February 7, 1867; Wisconsin, February 13, 1867; Pennsylvania, February 13, 1867; Michigan, February 15, 1867; Massachusetts, March 20, 1867; Nebraska, June 15, 1867; Iowa, April 3, 1868; Arkansas, April 6, 1868; Florida, June 9, 1868; Louisiana, July 9, 1868; and Alabama, July 13, 1868. Georgia again ratified the amendment February 2, 1870. Texas rejected it November 1, 1866, and ratified it February 18, 1870. Virginia rejected it January 19, 1867, and ratified it October 8, 1869. The amendment was rejected by Kentucky January 10, 1867; by Delaware, February 8, 1867; by Maryland, March 23, 1867, and was not afterward ratified by either State.

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Co. *v.* N. Y., 134 U. S., 594; Leisy *v.* Hardin, 135 U. S. 100; In re Kemmler, 136 U. S. 436; York *v.* Texas, 137 U. S. 15; Crowley *v.* Christensen, 137 U. S. 89; Wheeler *v.* Jackson, 137 U. S. 245; Holden *v.* Minnesota, 137 U. S. 483; In re Converse, 137 U. S. 624; Caldwell *v.* Texas, 137 U. S. 692; Kauffman *v.* Wootters, 138 U. S. 285; Lesper *v.* Texas, 139 U. S. 462; In re Manning, 139 U. S. 504; Mabal *v.* Louisiana, 139 U. S. 621; In re Duncan, 139 U. S. 449; In re Shibuya Jugiro, 139 U. S. 291; Lent *v.* Tillson, 140 U. S. 316; New Orleans *v.* N. O. Water W'ks, 142 U. S. 79; McElvaine *v.* Brush, 142 U. S. 155; Kaukauna Water Power Co. *v.* Miss. Canal Co., 142 U. S. 254; Charlotte, Augusta & Col. R. Rd. Co. *v.* Gibbes, 142 U. S. 386; Pacific Ex. Co. *v.* Siebert, 142 U. S. 339; Horn Silver Mining Co. *v.* N. Y., 143 U. S. 305; Budd *v.* N. Y., 143 U. S. 517; Schwab *v.* Berggren, 143 U. S. 442; Fielden *v.* Illinois, 143 U. S. 452; N. Y. *v.* Squire, 144 U. S. 175; Brown *v.* Smart, 144 U. S. 454; McPherson *v.* Blacker, 146 U. S. 1; Morley *v.* Lake Shore & Mich. Southern Ry. Co., 146 U. S. 162; Hallinger *v.* Davis, 146 U. S. 314; Yesler *v.* Washington Harbor Line Comsrs., 146 U. S. 646; Butler *v.* Gorley, 146 U. S. 303; Southern Pacific Co. *v.* Denton, 146 U. S. 202; Thorington *v.* Montgomery, 147 U. S. 490; Giozza *v.* Tiernan, 148 U. S. 657; Paulsen *v.* Portland, 149 U. S. 30; Minn. & St. L. Rwy. Co. *v.* Emmons, 149 U. S. 364; Columbus So. Railway Co. *v.* Wright, 151 U. S. 470; In re Frederick, 149 U. S. 70; McNulty *v.* Calif., 149 U. S. 645; Lees *v.* U. S. 150 U. S. 476; Lawton *v.* Steele, 152 U. S. 133; Montana Co. *v.* St. Louis Mining Co., 152 U. S. 160; Duncan *v.* Missouri, 152 U. S. 377; McKane *v.* Durston, 153 U. S. 684; Marchant *v.* Penna. R. R. Co., 153 U. S. 380; Brass *v.* Stoeser, 153 U. S. 391; Scott *v.* McNeal, 154 U. S. 34; Reagan *v.* Far. Loan & Trust Co., 154 U. S. 362; P., C., C. & St. L. R. R. Co. *v.* Backus, 154 U. S. 421; Interstate Com. Comsn. *v.* Brimson, 154 U. S. 447; Reagan *v.* Mercantile Trust Co., 154 U. S. 447; Pearce *v.* Texas, 156 U. S. 311; Pittsburgh & So. Coal Co. *v.* La., 156 U. S. 590; Andrews *v.* Swartz, 156 U. S. 272; St. L. & S. F. Rwy. Co. *v.* Gill, 156 U. S. 649; Stevens, adm., *v.* Nichols, 157 U. S. 370; Bergemann *v.* Becker, 157 U. S. 655; Quarles *v.* Butler, 158 U. S. 532; Gray *v.* Connecticut, 159 U. S. 74; Central Land Co. *v.* Laidley, 159 U. S. 103; Moore *v.* Missouri, 159 U. S. 673; Winona & St. Peter Land Co. *v.* Minn., 159 U. S. 528.

SEC. II. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and

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citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SEC. III. No person shall be a Senator or Representative in Congress, or elector of President or Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SEC. IV. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SEC. V. The Congress shall have power to enforce by appropriate legislation, the provisions of this article.

Crandall *v.* The State of Nevada, 6 Wall. 35; Paul *v.* Virginia, 8 Wall. 268; Ward *v.* Maryland, 12 Wall. 418; Slaughterhouse Cases, 16 Wall. 36; Bradwell *v.* The State, 16 Wall. 130; Bartemeyer *v.* Iowa, 18 Wall. 129; Minor *v.* Happersett, 21 Wall. 162; Walker *v.* Sauvinet, 92 U. S. 90; Kennard *v.* Louisiana, ex rel. Morgan, 92 U. S. 480; U. S. *v.* Cruikshank, 92 U. S. 542; Munn *v.* Illinois, 94 U. S. 113.

ARTICLE XV.*

SECTION I. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

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* The fifteenth amendment to the constitution of the United States was proposed to the legislatures of the several states by the Fortieth Congress on the 27th of February, 1869, and was declared, in a proclamation of the Secretary of State, dated March 30, 1870, to have been ratified by the legislatures of twenty-nine of the thirty-seven states. The dates of these ratifications (arranged in the order of their reception at the Department of State) were: From North Carolina, March 5, 1869; West Virginia, March 3, 1869; Massachusetts, March 9–12, 1869; Wisconsin, March 9, 1869; Maine, March 12, 1869; Louisiana, March 5, 1869; Michigan, March 8, 1869; South Carolina, March 16, 1869; Pennsylvania, March 26, 1869; Arkansas, March 30, 1869; Connecticut, May 19, 1869; Florida, June 15, 1869; Illinois, March 5, 1869; Indiana, May 13–14, 1869; New York, March 17– April 14, 1869 (and the legis-

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SEC. II. The Congress shall have power to enforce this article by appropriate legislation.

United States *v.* Reese et al., 92 U. S. 214; United States *v.* Cruikshank et al., 92 U. S. 542; Ex parte Yarborough, 110 U. S. 651; McPherson *v.* Blacker, 146 U. S. 1.

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lature of the same state passed a resolution January 5, 1870, to withdraw its consent to it); New Hampshire, July 7, 1869; Nevada, March 1, 1869; Vermont, October 21, 1869; Virginia, October 8, 1869; Missouri, January 10, 1870; Mississippi, January 15–17, 1870; Ohio, January 27, 1870; Iowa, February 3, 1870; Kansas, January 18–19, 1870; Minnesota, February 19, 1870; Rhode Island, January 18, 1870; Nebraska, February 17, 1870; Texas, February 18, 1870. The state of Georgia also ratified the amendment February 2, 1870.

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PROPOSED AMENDMENTS TO THE CONSTITUTION.

AMENDMENTS PROPOSED BY THE CONVENTION OF MASSACHUSETTS, 1788.

First. That it be explicitly declared that all powers not expressly delegated by the aforesaid constitution are reserved to the several states to be by them exercised.

Secondly. That there shall be one representative to every thirty thousand persons according to the census mentioned in the constitution, until the whole number of representatives amounts to two hundred.

Thirdly. That Congress do not exercise the powers vested in them by the fourth section of the first article, but in cases where a state shall neglect or refuse to make the regulations therein mentioned, or shall make regulations subversive of the rights of the people to a free and equal representation in Congress, agreeably to the constitution.

Fourthly. That Congress do not lay direct taxes but when the moneys arising from the impost and excise are insufficient for the public exigencies, nor then until Congress shall have first made a requisition upon the states to assess, levy and pay their respective proportion of such requisitions, agreeably to the census fixed in the said constitution, in such way and manner as the legislatures of the states shall think best, and in such case if any state shall neglect or refuse to pay its proportion pursuant to such requisition, then Congress may assess and levy such state's proportion, together with interest thereon at the rate of six per cent. per annum, from the time of payment, prescribed in such requisitions.

Fifthly. That Congress erect no company with exclusive advantages of commerce.

Sixthly. That no person shall be tried for any crime by which he may incur an infamous punishment, or loss of life, until he be first indicted by a grand jury, except in such cases as may arise in the government and regulation of the land and naval forces.

Seventhly. The Supreme Judicial Federal Court shall have no jurisdiction of causes between citizens of different states, unless the matter in dispute, whether it concerns the realty or personalty, be of the value of three thousand dollars at the least—nor shall the federal judicial powers extend to any action between citizens of different states, where the matter in dispute, whether it concerns

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the realty or personalty, is not of the value of fifteen hundred dollars at the least.

Eighthly. In civil actions between citizens of different states, every issue of fact arising in actions at common law, shall be tried by a jury, if the parties or either of them request it.

Ninthly. Congress shall at no time consent that any person holding an office of trust or profit under the United States shall accept of a title of nobility, or any other title or office, from any king, prince, or foreign state.

AMENDMENTS PROPOSED BY THE CONVENTION OF SOUTH CAROLINA, 1788.

And whereas it is essential to the preservation of the rights reserved to the several states, and the freedom of the people, under the operations of a general government, that the right of prescribing the manner, time, and places of holding the elections to the federal legislature, should be forever inseparably annexed to the sovereignty of the several states; This convention doth declare, that the same ought to remain to all posterity, a perpetual and fundamental right in the local, exclusive of the interference of the general government, except in cases where the legislatures of the states shall refuse or neglect to perform and fulfill the same, according to the tenor of the said constitution.

This convention doth also declare, That no section or paragraph of the said constitution, warrants a construction that the states do not retain every power not expressly relinquished by them, and vested in the general government of the union.

Resolved, That the general government of the United States ought never to impose direct taxes, but where the moneys arising from the duties, imposts and excise, are insufficient for the public exigencies, nor then until Congress shall have made a requisition upon the states to assess, levy, and pay their respective proportions of such requisitions; and in case any state shall neglect or refuse to pay its proportion, pursuant to such requisition, then Congress may assess and levy such state's proportion, together with interest thereon, at the rate of six per centum per annum, from the time of payment prescribed by such requisition.

Resolved, That the third section of the sixth article ought to be amended, by inserting the word "other," between the words "no" and "religious."

Resolved, That it be a standing instruction to all such delegates as may hereafter be elected to represent this state in the general government, to exert their utmost abilities and influence, to effect an alteration of the constitution, conformably to the aforegoing resolutions.

AMENDMENTS PROPOSED BY THE CONVENTION OF NEW HAMPSHIRE, 1788.

The convention do therefore recommend, that the following alterations and provisions be introduced into the said constitution.

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First. That it be explicitly declared that all powers not expressly and particularly delegated by the aforesaid constitution, are reserved to the several states to be by them exercised.

Secondly. That there shall be one representative to every thirty thousand persons according to the census mentioned in the constitution, until the whole number of representatives amount to two hundred.

Thirdly. That Congress do not exercise the powers vested in them by the fourth section of the first article, but in cases when a state shall neglect or refuse to make the regulations therein mentioned, or shall make regulations subversive of the rights of the people to a free and equal representation in Congress—Nor shall Congress in any case make regulations contrary to a free and equal representation.

Fourthly. That Congress do not lay direct taxes but when the money arising from impost, excise, and their other resources, are insufficient for the public exigencies, nor then, until Congress shall have first made a requisition upon the states, to assess, levy and pay their respective proportions of such requisition, agreeably to the census fixed in the said constitution, in such way and manner as the legislature of the state shall think best, and in such case if any state shall neglect, then Congress may assess and levy such state's proportion, together with the interest thereon at the rate of six per cent. per annum, from the time of payment, prescribed in such requisition.

Fifthly. That Congress shall erect no company of merchants with exclusive advantages of commerce.

Sixthly. That no person shall be tried for any crime by which he may incur an infamous punishment, or loss of life, until he first be indicted by a grand jury, except in such cases as may arise in the government and regulation of the land and naval forces.

Seventhly. All common law cases between citizens of different states, shall be commenced in the common law courts of the respective states, and no appeal shall be allowed to the federal court, in such cases, unless the sum or value of the thing in controversy amount to three thousand dollars.

Eighthly. In civil actions between citizens of different states, every issue of fact arising in actions at common law, shall be tried by jury, if the parties or either of them request it.

Ninthly. Congress shall at no time consent that any person holding an office of trust or profit under the United States, shall accept any title of nobility, or any other title or office, from any king, or foreign state.

Tenth. That no standing army shall be kept up in time of peace, unless with the consent of three-fourths of the members of each branch of Congress, nor shall soldiers in time of peace be quartered upon private houses, without the consent of the owners.

Eleventh. Congress shall make no laws touching religion, or to infringe the rights of conscience.

Twelfth. Congress shall never disarm any citizen, unless such as are or have been in actual rebellion.

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AMENDMENTS PROPOSED BY THE CONVENTION OF VIRGINIA, 1788.

Subsequent amendments agreed to in convention, as necessary to the proposed constitution of government for the United States, recommended to the consideration of the Congress which shall first assemble under the said constitution, to be acted upon according to the mode prescribed in the fifth article thereof—*videlicet:*

That there be a declaration or bill of rights, asserting and securing from encroachment, the essential and unalienable rights of the people, in some such manner as the following:

First. That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety. *Second.* That all power is naturally invested in, and consequently derived from the people; that magistrates, therefore, are their trustees and agents, at all times amenable to them. *Third.* That government ought to be instituted for the common benefit, protection and security of the people; and that the doctrine of non-resistance against arbitrary power and oppression, is absurd, slavish, and destructive of the good and happiness of mankind. *Fourth.* That no man or set of men are entitled to separate or exclusive public emoluments or privileges from the community, but in consideration of public services, which not being descendible, neither ought the offices of magistrate, legislator, or judge, or any other public office to be hereditary. *Fifth.* That the legislative, executive and judicial powers of government should be separate and distinct, and that the members of the two first may be restrained from oppression by feeling and participating the public burdens, they should, at fixed periods, be reduced to a private station, return into the mass of the people, and the vacancies be supplied by certain and regular elections; in which all or any part of the former members to be eligible or ineligible, as the rules of the constitution of government, and the laws shall direct. *Sixth.* That the elections of representatives in the legislature ought to be free and frequent, and all men having sufficient evidence of permanent common interest, with an attachment to the community, ought to have the right of suffrage: and no aid, charge, tax or fee can be set, rated or levied upon the people without their own consent, or that of their representatives so elected, nor can they be bound by any law to which they have not in like manner assented for the public good. *Seventh.* That all power of suspending laws, or the execution of laws, by any authority, without the consent of the representatives of the people in the legislature, is injurious to their rights, and ought not to be exercised. *Eighth.* That in all capital and criminal prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence, and be allowed counsel in his favor, and to a fair and speedy trial

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by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, (except in the government of the land and naval forces;) nor can he be compelled to give evidence against himself. *Ninth.* That no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties, privileges, or franchises, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the law of the land. *Tenth.* That every freeman restrained of his liberty, is entitled to a remedy, to inquire into the lawfulness thereof, and to remove the same, if unlawful, and that such remedy ought not to be denied nor delayed. *Eleventh.* That in controversies respecting property, and in suits between man and man, the ancient trial by jury is one of the greatest securities to the rights of the people, and ought to remain sacred and inviolable. *Twelfth.* That every freeman ought to find a certain remedy by recourse to the laws for all injuries and wrongs he may receive in his person, property or character. He ought to obtain right and justice freely without sale, completely and without denial, promptly and without delay, and that all establishments or regulations contravening these rights, are oppressive and unjust. *Thirteenth.* That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. *Fourteenth.* That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers and property; all warrants, therefore, to search suspected places, or seize any freeman, his papers or property, without information on oath (or affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend any suspected person, without specially naming or describing the place or person, are dangerous and ought not to be granted. *Fifteenth.* That the people have a right peaceably to assemble together to consult for the common good, or to instruct their representatives; and that every freeman has a right to petition or apply to the legislature for redress of grievances. *Sixteenth.* That the people have a right to freedom of speech, and of writing and publishing their sentiments; that the freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated. *Seventeenth.* That the people have a right to keep and bear arms; that a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural and safe defense of a free state. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that in all cases the military should be under strict subordination to and governed by the civil power. *Eighteenth.* That no soldier in time of peace ought to be quartered in any house without the consent of the owner, and in time of war in such manner only as the law directs. *Nineteenth.* That any person religiously scrupulous of bearing arms, ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead. *Twentieth.* That religion, or the duty which we owe

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to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by law in preference to others.

AMENDMENTS TO THE BODY OF THE CONSTITUTION.

First. That each state in the union shall respectively retain every power, jurisdiction, and right, which is not by this constitution delegated to the Congress of the United States, or to the departments of the federal government. *Second.* That there shall be one representative for every thirty thousand according to the enumeration or census mentioned in the constitution, until the whole number of representatives amounts to two hundred; after which that number shall be continued or increased as Congress shall direct, upon the principles fixed in the constitution by apportioning the representatives of each state to some greater number of people from time to time as population increases. *Third.* When the Congress shall lay direct taxes or excises, they shall immediately inform the executive power of each state, of the quota of such state, according to the census herein directed, which is proposed to be thereby raised; and if the legislature of any state shall pass a law which shall be effectual for raising such quota at the time required by Congress, the taxes and excises laid by Congress shall not be collected in such state. *Fourth.* That the members of the Senate and House of Representatives shall be ineligible to, and incapable of holding any civil office under the authority of the United States, during the time for which they shall respectively be elected. *Fifth.* That the journals of the proceedings of the Senate and House of Representatives shall be published at least once in every year, except such parts thereof relating to treaties, alliances, or military operations, as in their judgment require secrecy. *Sixth.* That a regular statement and account of the receipts and expenditures of public money shall be published at least once a year. *Seventh.* That no commercial treaty shall be ratified without the concurrence of two-thirds of the whole number of the members of the Senate; and no treaty, ceding, contracting, restraining or suspending the territorial rights or claims of the United States, or any of them, or their, or any of their rights or claims to fishing in the American seas, or navigating the American rivers, shall be made, but in cases of the most urgent and extreme necessity, nor shall any such treaty be ratified without the concurrence of three-fourths of the whole number of the members of both houses respectively. *Eighth.* That no navigation law, or law regulating commerce, shall be passed without the consent of two-thirds of the members present in both houses. *Ninth.* That no standing army or regular troops shall be raised or kept up in time of peace, without the consent of two-thirds of the members present in both houses. *Tenth.* That no soldier shall be enlisted

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for any longer term than four years, except in time of war, and then for no longer term than the continuance of the war. *Eleventh.* That each state respectively, shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same. That the militia shall not be subject to martial law, except when in actual service in time of war, invasion, or rebellion; and when not in the actual service of the United States, shall be subject only to such fines, penalties, and punishments as shall be directed or inflicted by the laws of its own state. *Twelfth.* That the exclusive power of legislation given to Congress over the federal town, and its adjacent district, and other places purchased or to be purchased by Congress of any of the states, shall extend only to such regulations as respect the police and good government thereof. *Thirteenth.* That no person shall be capable of being President of the United States for more than eight years in any term of sixteen years. *Fourteenth.* That the judicial power of the United States shall be vested in one Supreme Court, and in such courts of admiralty as Congress may from time to time ordain and establish in any of the different states. The judicial power shall extend to all cases in law and equity arising under treaties made, or which shall be made, under the authority of the United States; to all cases affecting ambassadors, other foreign ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; and between parties claiming lands under the grants of different states. In all cases affecting ambassadors, other foreign ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction; in all other cases before mentioned, the Supreme Court shall have appellate jurisdiction as to matters of law only; except in cases of equity, and of admiralty and maritime jurisdiction, in which the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make. But the judicial power of the United States shall extend to no case where the cause of action shall have originated before the ratification of this constitution; except in disputes between states about their territory, disputes between persons claiming lands under the grants of different states, and suits for debts due to the United States. *Fifteenth.* That in criminal prosecutions no man shall be restrained in the exercise of the usual and accustomed right of challenging or excepting to the jury. *Sixteenth.* That Congress shall not alter, modify, or interfere in the times, places, or manner of holding elections for senators and representatives, or either of them, except when the legislature of any state shall neglect, refuse, or be disabled by invasion or rebellion, to prescribe the same. *Seventeenth.* That those clauses which declare that Congress shall not exercise certain powers be not interpreted in any manner whatsoever to extend the powers of Congress. But that they may be construed either as making exceptions to the specified powers

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where this shall be the case, or otherwise as inserted merely for greater caution. *Eighteenth.* That the laws ascertaining the compensation to senators and representatives for their services, be postponed in their operation, until after the election of representatives immediately succeeding the passing thereof; that excepted, which shall first be passed on the subject. *Nineteenth.* That some tribunal other than the Senate be provided for trying impeachments of senators. *Twentieth.* That the salary of a judge shall not be increased or diminished during his continuance in office, otherwise than by general regulations of salary which may take place on a revision of the subject at stated periods of not less than seven years, to commence from the time such salaries shall be first ascertained by Congress. And the convention do, in the name and behalf of the people of this Commonwealth, enjoin it upon their representatives in Congress, to exert all their influence, and use all reasonable and legal methods to obtain a ratification of the foregoing alterations and provisions, in the manner provided by the fifth article of the said constitution; and in all congressional laws to be passed in the meantime, to conform to the spirit of those amendments as far as the said constitution will admit.

AMENDMENTS PROPOSED BY THE CONVENTION OF NEW YORK, 1788.

We, the delegates of the people of the State of New York, duly elected and met in convention, having maturely considered the constitution for the United States of America, agreed to on the seventeenth day of September, in the year one thousand seven hundred and eighty-seven, by the convention then assembled at Philadelphia, in the commonwealth of Pennsylvania, (a copy whereof precedes these presents) and having also seriously and deliberately considered the present situation of the United States, Do declare and make known,

That all power is originally vested in and consequently derived from the people, and that government is instituted by them for their common interest, protection and security.

That the enjoyment of life, liberty and the pursuit of happiness, are essential rights which every government ought to respect and preserve.

That the powers of government may be reassumed by the people, whensoever it shall become necessary to their happiness; that every power, jurisdiction and right, which is not by the said constitution clearly delegated to the Congress of the United States, or the departments of the government thereof, remains to the people of the several states, or to their respective state governments, to whom they may have granted the same; and that those clauses in the said constitution, which declare, that Congress shall not have or exercise certain powers, do not imply that Congress is entitled to any powers not given by the said constitution; but such clauses are to be construed either as exceptions to certain specified powers, or as inserted merely for greater caution,

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That the people have an equal, natural and unalienable right, freely and peaceably to exercise their religion, according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference of others.

That the people have a right to keep and bear arms; that a well regulated militia, including the body of the people *capable of bearing arms*, is the proper, natural, and safe defense of a free state.

That the militia should not be subject to martial law, except in time of war, rebellion or insurrection.

That standing armies in time of peace are dangerous to liberty, and ought not to be kept up, except in cases of necessity, and that at all times the military should be under strict subordination to the civil power.

That in time of peace no soldier ought to be quartered in any house without the consent of the owner; and in time of war, only by the civil magistrate, in such manner as the laws may direct.

That no person ought to be taken, imprisoned or disseized of his freehold, or be exiled or deprived of his privileges, franchises, life, liberty or property, but by due process of law.

That no person ought to be put twice in jeopardy of life or limb for one and the same offense, nor, unless in case of impeachment, be punished more than once for the same offense.

That every person restrained of his liberty is entitled to an inquiry into the lawfulness of such restraint, and to a removal thereof if unlawful, and that such inquiry and removal ought not to be denied or delayed, except when, on account of public danger, the Congress shall suspend the privilege of the writ of Habeas Corpus.

That excessive bail ought not to be required; nor excessive fines imposed; nor cruel or unusual punishments inflicted.

That (except in the government of the land and naval forces, and of the militia when in actual service, and in cases of impeachment) a presentment or indictment by a grand jury ought to be observed as a necessary preliminary to the trial of all crimes cognizable by the judiciary of the United States; and such trial should be speedy, public, and by an impartial jury of the county where the crime was committed; and that no person can be found guilty without the unanimous consent of such jury. But in cases of crimes not committed within any county of any of the United States, and in cases of crimes committed within any county in which a general insurrection may prevail, or which may be in the possession of a foreign enemy, the inquiry and trial may be in such county as the Congress shall by law direct; which county in the two cases last mentioned, should be as near as conveniently may be to that county in which the crime may have been committed. And that in all criminal prosecutions, the accused ought to be informed of the cause and nature of his accusation, to be confronted with his accusers and the witnesses against him, to have the means of producing the witnesses, and the assistance of council for his defense, and should not be compelled to give evidence against himself.

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That the trial by jury in the extent that it obtains by the common law of England, is one of the greatest securities to the rights of a free people, and ought to remain inviolate.

That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers or his property; and therefore, that all warrants to search suspected places, or seize any freeman, his papers or property, without information upon oath or affirmation of sufficient cause, are grievous and oppressive; and that all general warrants, (or such in which the place or person suspected are not particularly designated) are dangerous and ought not to be granted.

That the people have a right peaceably to assemble together to consult for their common good, or to instruct their representatives, and that every person has a right to petition or apply to the legislature for redress of grievances.

That the freedom of the press ought not to be violated or restrained.

That there should be once in four years, an election of the president and vice president, so that no officer who may be appointed by the Congress to act as President, in case of the removal, death, resignation or inability of the president and vice president, can in any case continue to act beyond the termination of the period for which the last president and vice president were elected.

That nothing contained in the said constitution, is to be construed to prevent the legislature of any state from passing laws in its discretion, from time to time, to divide such state into convenient districts, and to apportion its representatives to, and amongst such districts.

That the prohibition contained in the said constitution, against ex post facto laws, extends only to laws concerning crimes.

That all appeals in causes, determinable according to the course of the common law, ought to be by writ of error, and not otherwise.

That the judicial power of the United States, in cases in which a state may be a party, does not extend to criminal prosecutions, or to authorize any suit by any person against a state.

That the judicial power of the United States, as to controversies between citizens of the same state, claiming lands under grants of different states, is not to be construed to extend to any other controversies between them, except those which relate to such lands, so claimed, under grants of different states.

That the jurisdiction of the Supreme Court of the United States, or of any other court to be instituted by the Congress, is not in any case to be increased, enlarged, or extended, by any fiction, collusion or mere suggestion; and that no treaty is to be construed, so to operate, as to alter the constitution of any state.

Under these impressions, and declaring that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid, are consistent with the said constitution, and in confidence that the amendments which shall have been proposed to the said constitution, will receive an early and mature consideration: We,

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the said delegates, in the name and in the behalf of the people of the State of New York, Do, by these presents, assent to and Ratify the said constitution. In full confidence, nevertheless, that until a convention shall be called and convened for proposing amendments to the said constitution, the militia of this state will not be continued in service out of this state for a longer term than six weeks, without the consent of the legislature thereof; that the Congress will not make or alter any regulation in this state, respecting the times, places, and manner of holding elections for senators or representatives, unless the legislature of this state shall neglect or refuse to make laws or regulations for the purpose, or from any circumstance be incapable of making the same; and that in those cases such power will only be exercised until the legislature of this state shall make provision in the premises; that no excise will be imposed on any article of the growth, production or manufacture of the United States, or any of them, within this state, ardent spirits excepted; and that the Congress will not lay direct taxes within this state, but when the moneys arising from the impost and excise shall be insufficient for the public exigencies, nor then, until Congress shall first have made a requisition upon this state to assess, levy and pay the amount of such requisition, made agreeably to the census fixed in the said constitution, in such way and manner as the legislature of this state shall judge best; but that in such case, if the state shall neglect or refuse to pay its proportion pursuant to such requisition, then the Congress may assess and levy this state's proportion, together with interest at the rate of six per centum per annum, from the time at which the same was required to be paid.

. . . And the convention do, in the name and behalf of the people of the State of New York, enjoin it upon their representatives in the Congress, to exert all their influence and use all reasonable means to obtain a ratification of the following amendments to the said constitution in the manner prescribed therein; and in all laws to be passed by the Congress in the mean time, to conform to the spirit of the said amendments as far as the constitution will admit.

That there shall be one representative for every thirty thousand inhabitants, according to the enumeration or census mentioned in the constitution, until the whole number of representatives amounts to two hundred; after which that number shall be continued or increased, but not diminished, as Congress shall direct, and according to such ratio as the Congress shall fix, in conformity to the rule prescribed for the apportionment of representatives and direct taxes.

That the Congress do not impose any excise on any article (ardent spirits excepted) of the growth, production or manufacture of the United States, or any of them.

That the Congress do not lay direct taxes, but when the moneys arising from the impost and excise, shall be insufficient for the public exigencies, nor then, until Congress shall first have made a requisition upon the states, to assess, levy and pay their respective proportion of such requisition, agreeably to the census fixed

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in the said constitution, in such way and manner, as the legislature of the respective states shall judge best;—and in such case, if any state shall neglect or refuse to pay its proportion, pursuant to such requisition, then Congress may assess and levy such state's proportion, together with interest at the rate of six per centum per annum, from the time of payment, prescribed in such requisition.

That the Congress shall not make or alter any regulation, in any state, respecting the times, places and manner of holding elections for senators or representatives, unless the legislature of such state shall neglect or refuse to make laws or regulations for the purpose, or from any circumstance be incapable of making the same, and then only, until the legislature of such state shall make provision in the premises; provided that Congress may prescribe the time for the election of representatives.

That no persons, except natural born citizens, or such as were citizens on or before the 4th day of July, 1776, or such as held commissions under the United States during the war, and have at any time, since the 4th day of July, 1776, become citizens of one or other of the United States, and who shall be freeholders, shall be eligible to the places of president, vice president, or members of either house of the Congress of the United States.

That the Congress do not grant monopolies, or erect any company, with exclusive advantages of commerce.

That no standing army or regular troops shall be raised, or kept up in time of peace, without the consent of two-thirds of the senators and representatives present in each house.

That no money be borrowed on the credit of the United States without the assent of two-thirds of the senators and representatives present in each house.

That the Congress shall not declare war without the concurrence of two-thirds of the senators and representatives present in each house.

That the privilege of the Habeas Corpus shall not by any law be suspended for a longer term than six months, or until twenty days after the meeting of the Congress next following the passing the act for such suspension.

That the right of the Congress to exercise exclusive legislation over such district, not exceeding ten miles square, as may by cession of a particular state, and the acceptance of Congress, become the seat of the government of the United States, shall not be so exercised as to exempt the inhabitants of such district from paying the like taxes, imposts, duties and excises, as shall be imposed on the other inhabitants of the state in which such district may be; and that no person shall be privileged within the said district from arrest for crimes committed, or debts contracted out of the said district.

That the right of exclusive legislation with respect to such places as may be purchased for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings, shall not authorize the Congress to make any law to prevent the laws of the states respectively in which they may be, from extending to such places

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in all civil and criminal matters, except as to such persons as shall be in the service of the United States; nor to them with respect to crimes committed without such places.

That the compensation for the senators and representatives be ascertained by standing laws; and that no alteration of the existing rate of compensation shall operate for the benefit of the representatives, until after a subsequent election shall have been had.

That the journals of the Congress shall be published at least once a year, with the exception of such parts relating to treaties or military operations, as in the judgment of either house shall require secrecy; and that both houses of Congress shall always keep their doors open during their sessions, unless the business may in their opinion require secrecy. That the yeas and nays shall be entered on the journals whenever two members in either house may require it.

That no capitation tax shall ever be laid by the Congress.

That no person shall be eligible as a senator for more than six years in any term of twelve years; and that the legislatures of the respective states may recall their senators or either of them, and elect others in their stead, to serve the remainder of the time for which the senators so recalled were appointed.

That no senator or representative shall, during the time for which he was elected, be appointed to any office under the authority of the United States.

That the authority given to the executives of the states to fill the vacancies of senators be abolished, and that such vacancies be filled by the respective legislatures.

That the power of Congress to pass uniform laws concerning bankruptcy, shall only extend to merchants and other traders; and that the states respectively may pass laws for the relief of other insolvent debtors.

That no person shall be eligible to the office of president of the United States, a third time.

That the executive shall not grant pardons for treason, unless with the consent of the Congress; but may, at his discretion, grant reprieves to persons convicted of treason, until their cases can be laid before the Congress.

That the president, or person exercising his powers for the time being, shall not command an army in the field in person, without the previous desire of the Congress.

That all letters patent, commissions, pardons, writs and processes of the United States, shall run in the name of *the people of the United States*, and be tested in the name of the president of the United States, or the person exercising his powers for the time being, or the first judge of the court out of which the same shall issue, as the case may be.

That the Congress shall not constitute, ordain, or establish any tribunals or inferior courts, with any other than appellate jurisdiction, except such as may be necessary for the trial of causes of admiralty, and maritime jurisdiction, and for the trial of piracies and felonies committed on the high seas; and in all other cases, to

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which the judicial power of the United States extends, and in which the supreme court of the United States has not original jurisdiction, the causes shall be heard, tried, and determined, in some one of the state courts, with the right of appeal to the supreme court of the United States, or other proper tribunal, to be established for that purpose, by the Congress, with such exceptions, and under such regulations as the Congress shall make.

That the court for the trial of impeachments shall consist of the senate, the judges of the supreme court of the United States, and the first or senior judge, for the time being, of the highest court of general and ordinary common law jurisdiction in each state; that the Congress shall, by standing laws, designate the courts in the respective states answering this description, and in states having no courts exactly answering this description, shall designate some other court, preferring such, if any there be, whose judge or judges may hold their places during good behavior: provided that no more than one judge, other than judges of the supreme court of the United States, shall come from one state.

That the Congress be authorized to pass laws for compensating the judges for such services, and for compelling their attendance; and that a majority at least of the said judges shall be requisite to constitute the said court. That no person impeached shall sit as a member thereof—that each member shall, previous to the entering upon any trial, take an oath or affirmation, honestly and impartially to hear and determine the cause; and that a majority of the members present shall be necessary to a conviction.

That persons aggrieved by any judgment, sentence or decree of the supreme court of the United States in any cause in which that court has original jurisdiction, with such exceptions and under such regulations as the Congress shall make concerning the same, shall upon application, have a commission, to be issued by the president of the United States, to such men learned in the law as he shall nominate, and by and with the advice and consent of the senate appoint not less than seven, authorizing such commissioners, or any seven or more of them, to correct the errors in such judgment, or to review such sentence, and decree as the case may be, and to do justice to the parties in the premises.

That no judge of the supreme court of the United States shall hold any other office under the United States, or any of them.

That the judicial power of the United States shall extend to no controversies respecting land, unless it relate to claims of territory or jurisdiction between states, or to claims of land between individuals, or between states and individuals under the grants of different states.

That the militia of any state shall not be compelled to serve without the limits of the state for a longer term than six weeks, without the consent of the legislature thereof.

That the words *without the consent of the Congress*, in the seventh clause of the ninth section of the first article of the constitution be expunged.

That the senators and representatives, and all executive and

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judicial officers of the United States, shall be bound by oath or affirmation not to infringe or violate the constitutions or rights of the respective states.

That the legislature of the respective states may make provision by law, that the electors of the election districts, to be by them appointed, shall choose a citizen of the United States, who shall have been an inhabitant of such district for the term of one year immediately preceding the time of his election, for one of the representatives of such state.

AMENDMENTS PROPOSED BY THE CONVENTION OF NORTH CAROLINA, 1788.

Resolved, That a declaration of rights, asserting and securing from encroachment the great principles of civil and religious liberty, and the unalienable rights of the people, together with amendments to the most ambiguous and exceptionable parts of the said constitution of government, ought to be laid before Congress, and the convention of the states that shall or may be called for the purpose of amending the said constitution, for their consideration, previous to the ratification of the constitution aforesaid, on the part of the state of North Carolina.

Declaration of Rights.

1st. That there are certain natural rights of which men, when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.

2d. That all power is naturally vested in, and consequently derived from the people; that magistrates therefore are their trustees and agents, and at all times amenable to them.

3d. That government ought to be instituted for the common benefit, protection, and security of the people; and that the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive to the good and happiness of mankind.

4th. That no man or set of men, are entitled to exclusive or separate public emoluments, or privileges from the community, but in consideration of the public services; which not being descendible, neither ought the offices of magistrate, legislator, or judge, or any other public office, to be hereditary.

5th. That the legislative, executive and judiciary powers of government should be separate and distinct, and that the members of the two first may be restrained from oppression, by feeling and participating the public burdens, they should at fixed periods be reduced to a private station, return into the mass of the people; and the vacancies be supplied by certain and regular elections, in which all or any part of the former members to be eligible or ineligible, as the rules of the constitution of government, and the laws shall direct.

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6th. That elections of representatives in the legislature ought to be free and frequent, and all men having sufficient evidence of permanent common interest with, and attachment to the community, ought to have the right of suffrage; and no aid, charge, tax or fee, can be set, rated or levied upon the people without their own consent, or that of their representatives so elected, nor can they be bound by any law, to which they have not in like manner assented for the public good.

7th. That all power of suspending laws, or the execution of laws, by any authority, without the consent of the representatives of the people in the legislature, is injurious to their rights, and ought not to be exercised.

8th. That in all capital and criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence, and be allowed counsel in his favor, and a fair and speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, (except in the government of the land and naval forces;) nor can he be compelled to give evidence against himself.

9th. That no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties, privileges or franchises, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the law of the land.

10th. That every freeman restrained of his liberty, is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same, if unlawful, and that such remedy ought not to be denied nor delayed.

11th. That in controversies respecting property, and in suits between man and man, the ancient trial by jury is one of the greatest securities to the rights of the people, and ought to remain sacred and inviolable.

12th. That every freeman ought to find a certain remedy by recourse to the laws for all injuries and wrongs he may receive in person, property or character. He ought to obtain right and justice freely without sale, completely and without denial, promptly and without delay, and that all establishments, or regulations contravening these rights, are oppressive and unjust.

13th. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

14th. That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers, and property; all warrants therefore to search suspected places, or to apprehend any suspected person without specially naming or describing the place or person, are dangerous and ought not to be granted.

15th. That the people have a right peaceably to assemble together to consult for the common good, or to instruct their representatives; and that every freeman has a right to petition or apply to the legislature for redress of grievances.

16th. That the people have a right to freedom of speech, and

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of writing and publishing their sentiments; that freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated.

17th. That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that in all cases the military should be under strict subordination to, and governed by the civil power.

18th. That no soldier in time of peace ought to be quartered in any house without the consent of the owner, and in time of war in such manner only as the law directs.

19th. That any person religiously scrupulous of bearing arms ought to be exempted upon payment of an equivalent to employ another to bear arms in his stead.

20th. That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men have an equal, natural and unalienable right, to the free exercise of religion according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by law in preference to others.

Amendments to the Constitution.

I. That each state in the union shall, respectively, retain every power, jurisdiction and right, which is not by this constitution delegated to the Congress of the United States, or to the departments of the federal government.

II. That there shall be one representative for every thirty thousand, according to the enumeration or census, mentioned in the constitution, until the whole number of representatives amounts to two hundred, after which, that number shall be continued or increased, as Congress shall direct, upon the principles fixed in the constitution, by apportioning the representatives of each state to some greater number of the people from time to time, as population increases.

III. When Congress shall lay direct taxes or excises, they shall immediately inform the executive power of each state, of the quota of such state, according to the census herein directed, which is proposed to be thereby raised: And if the legislature of any state shall pass any law, which shall be effectual for raising such quota at the time required by Congress, the taxes and excises laid by Congress shall not be collected in such state.

IV. That the members of the Senate and House of representatives shall be ineligible to and incapable of holding any civil office under the authority of the United States, during the time for which they shall respectively be elected.

V. That the journals of the proceedings of the Senate and House of Representatives shall be published at least once in every year,

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except such parts thereof relating to treaties, alliances, or military operations, as in their judgment require secrecy.

VI. That a regular statement and account of the receipts and expenditures of the public moneys shall be published at least once in every year.

VII. That no commercial treaty shall be ratified without the concurrence of two-thirds of the whole number of the members of the Senate: And no treaty, ceding, contracting, or restraining or suspending the territorial rights or claims of the United States, or any of them, or their, or any of their, rights or claims of fishing in the American seas, or navigating the American rivers, shall be made, but in cases of the most urgent and extreme necessity; nor shall any such treaty be ratified without the concurrence of three-fourths of the whole number of the members of both houses respectively.

VIII. That no navigation law, or law regulating commerce, shall be passed without the consent of two-thirds of the members present in both houses.

IX. That no standing army or regular troops shall be raised or kept up in time of peace, without the consent of two-thirds of the members present in both houses.

X. That no soldier shall be enlisted for any longer term than four years, except in time of war, and then for no longer term than the continuance of the war.

XI. That each state respectively, shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same. That the militia shall not be subject to martial law, except when in actual service in time of war, invasion or rebellion: And when not in the actual service of the United States, shall be subject only to such fines, penalties and punishments, as shall be directed or inflicted by the laws of its own state.

XII. That Congress shall not declare any state to be in rebellion without the consent of at least two-thirds of all the members present in both houses.

XIII. That the exclusive power of legislation given to Congress over the federal town and its adjacent district, and other places, purchased or to be purchased by Congress, of any of the states, shall extend only to such regulations as respect the police and good government thereof.

XIV. That no person shall be capable of being President of the United States for more than eight years in any term of sixteen years.

XV. That the judicial power of the United States shall be vested in one Supreme Court, and in such courts of admiralty, as Congress may from time to time ordain and establish in any of the different states. The judicial power shall extend to all cases in law and equity, arising under treaties made, or which shall be made under the authority of the United States; to all cases affecting ambassadors, other foreign ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the

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United States shall be a party; to controversies between two or more states, and between parties claiming lands under the grants of different states. In all cases affecting ambassadors, other foreign ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction as to matters of law only, except in cases of equity, and of admiralty and maritime jurisdiction, in which the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make. But the judicial power of the United States shall extend to no case where the cause of action shall have originated before the ratification of this constitution, except in disputes between states about their territory, disputes between persons claiming lands under the grants of different states, and suits for debts due to the United States.

XVI. That in criminal prosecutions, no man shall be restrained in the exercise of the usual and accustomed right of challenging or excepting to the jury.

XVII. That Congress shall not alter, modify, or interfere in the times, places, or manner of holding elections for senators and representatives, or either of them, except when the legislature of any state shall neglect, refuse or be disabled by invasion or rebellion, to prescribe the same.

XVIII. That those clauses which declare that Congress shall not exercise certain powers, be not interpreted in any manner whatsoever to extend the powers of Congress; but that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.

XIX. That the laws ascertaining the compensation of senators and representatives for their services, be postponed in their operation, until after the election of representatives immediately succeeding the passing thereof, that excepted which shall first be passed on the subject.

XX. That some tribunal, other than the senate, be provided for trying impeachments of senators.

XXI. That the salary of a judge shall not be increased or diminished during his continuance in office, otherwise than by general regulations of salary which may take place, on a revision of the subject, at stated periods of not less than seven years, to commence from the time such salaries shall be first ascertained by Congress.

XXII. That Congress erect no company of merchants with exclusive advantages of commerce.

XXIII. That no treaties which shall be directly opposed to the existing laws of the United States in Congress assembled, shall be valid until such laws shall be repealed, or made conformable to such treaty; nor shall any treaty be valid which is contradictory to the constitution of the United States.

XXIV. That the latter part of the fifth paragraph of the ninth

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section of the first article be altered to read thus—"Nor shall vessels bound to a particular state be obliged to enter or pay duties in any other; nor when bound from any one of the states be obliged to clear in another."

XXV. That Congress shall not directly or indirectly, either by themselves or through the judiciary, interfere with any one of the states in the redemption of paper money already emitted and now in circulation, or in liquidating and discharging the public securities of any one of the states: But each and every state shall have the exclusive right of making such laws and regulations for the above purpose, as they shall think proper.

XXVI. That Congress shall not introduce foreign troops into the United States without the consent of two-thirds of the members present of both houses.

JEFFERSON'S OPINION ON THE CONSTITUTIONALITY OF A NATIONAL BANK, 1791.

The bill for establishing a National Bank undertakes among other things:

1. To form the subscribers into a corporation.

2. To enable them in their corporate capacities to receive grants of land; and so far is against the laws of *Mortmain*.*

3. To make alien subscribers capable of holding lands; and so far is against the laws of *Alienage*.

4. To transmit these lands, on the death of a proprietor, to a certain line of successors; and so far changes the course of *Descents*.

5. To put the lands out of the reach of forfeiture or escheat; and so far is against the laws of *Forfeiture and Escheat*.

6. To transmit personal chattels to successors in a certain line; and so far is against the laws of *Distribution*.

7. To give them the sole and exclusive right of banking under the national authority; and so far is against the laws of Monopoly.

8. To communicate to them a power to make laws paramount to the laws of the States; for so they must be construed, to protect the institution from the control of the State legislatures; and so, probably, they will be construed.

I consider the foundation of the Constitution as laid on this ground: That "all powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people." [XIIth amendment.] To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.

The incorporation of a bank, and the powers assumed by this

* Though the Constitution controls the laws of Mortmain so far as to permit Congress itself to hold land for certain purposes, yet not so far as to permit them to communicate a similar right to other corporate bodies.—T. J.

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bill, have not, in my opinion, been delegated to the United States, by the Constitution.

I. They are not among the powers specially enumerated: for these are: 1st. A power to lay taxes for the purpose of paying the debts of the United States; but no debt is paid by this bill, nor any tax laid. Were it a bill to raise money, its origination in the Senate would condemn it by the Constitution.

2. "To borrow money." But this bill neither borrows money nor ensures the borrowing it. The proprietors of the bank will be just as free as any other money holders, to lend or not to lend their money to the public. The operation proposed in the bill, first, to lend them two millions, and then to borrow them back again, cannot change the nature of the latter act, which will still be a payment, and not a loan, call it by what name you please.

3. To "regulate commerce with foreign nations, and among the States, and with the Indian tribes." To erect a bank, and to regulate commerce, are very different acts. He who erects a bank, creates a subject of commerce in its bills; so does he who makes a bushel of wheat, or digs a dollar out of the mines; yet neither of these persons regulates commerce thereby. To make a thing which may be bought and sold, is not to prescribe regulations for buying and selling. Besides, if this was an exercise of the power of regulating commerce, it would be void, as extending as much to the internal commerce of every State, as to its external. For the power given to Congress by the Constitution does not extend to the internal regulation of the commerce of a State, (that is to say of the commerce between citizen and citizen,) which remain exclusively with its own legislature; but to its external commerce only, that is to say, its commerce with another State, or with foreign nations, or with the Indian tribes. Accordingly the bill does not propose the measure as a regulation of trade, but as "productive of considerable advantages to trade." Still less are these powers covered by any other of the special enumerations.

II. Nor are they within either of the general phrases, which are the two following:

1. To lay taxes to provide for the general welfare of the United States, that is to say, "to lay taxes for *the purpose* of providing for the general welfare." For the laying of taxes is the *power*, and the general welfare the *purpose* for which the power is to be exercised. They are not to lay taxes *ad libitum for any purpose they please;* but only *to pay the debts or provide for the welfare of the Union.* In like manner, they are not *to do anything they please* to provide for the general welfare, but only *to lay taxes* for that purpose. To consider the latter phrase, not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please, which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless.

It would reduce the whole instrument to a single phrase, that of instituting a Congress with power to do whatever would be for the good of the United States; and, as they would be the sole

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judges of the good or evil, it would be also a power to do whatever evil they please.

It is an established rule of construction where a phrase will bear either of two meanings, to give it that which will allow some meaning to the other parts of the instrument, and not that which would render all the others useless. Certainly no such universal power was meant to be given them. It was intended to lace them up straitly within the enumerated powers, and those without which, as means, these powers could not be carried into effect. It is known that the very power now proposed *as a means* was rejected as *an end* by the Convention which formed the Constitution. A proposition was made to them to authorize Congress to open canals, and an amendatory one to empower them to incorporate. But the whole was rejected, and one of the reasons for rejection urged in debate was, that then they would have a power to erect a bank, which would render the great cities, where there were prejudices and jealousies on the subject, adverse to the reception of the Constitution.

2. The second general phrase is, "to make all laws *necessary* and proper for carrying into execution the enumerated powers." But they can all be carried into execution without a bank. A bank therefore is not *necessary*, and consequently not authorized by this phrase.

If has been urged that a bank will give great facility or convenience in the collection of taxes. Suppose this were true: yet the Constitution allows only the means which are "*necessary*," not those which are merely "convenient" for effecting the enumerated powers. If such a latitude of construction be allowed to this phrase as to give any non-enumerated power, it will go to everyone, for there is not one which ingenuity may not torture into a *convenience* in some instance *or other*, to *some one* of so long a list of enumerated powers. It would swallow up all the delegated powers, and reduce the whole to one power, as before observed. Therefore it was that the Constitution restrained them to the *necessary* means, that is to say, to those means without which the grant of power would be nugatory.

But let us examine this convenience and see what it is. The report on this subject, page 3, states the only *general* convenience to be, the preventing the transportation and re-transportation of money between the States and the treasury, (for I pass over the increase of circulating medium, ascribed to it as a want, and which, according to my ideas of paper money, is clearly a demerit.) Every State will have to pay a sum of tax money into the treasury; and the treasury will have to pay, in every State, a part of the interest on the public debt, and salaries to the officers of government resident in that State. In most of the States there will still be a surplus of tax money to come up to the seat of government for the officers residing there. The payments of interest and salary in each State may be made by treasury orders on the State collector. This will take up the greater part of the money he has collected in his State, and consequently prevent the great mass of

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it from being drawn out of the State. If there be a balance of commerce in favor of that State against the one in which the government resides, the surplus of taxes will be remitted by the bills of exchange drawn for that commercial balance. And so it must be if there was a bank. But if there be no balance of commerce, either direct or circuitous, all the banks in the world could not bring up the surplus of taxes, but in the form of money. Treasury orders then, and bills of exchange may prevent the displacement of the main mass of the money collected, without the aid of any bank; and where these fail, it cannot be prevented even with that aid.

Perhaps, indeed, bank bills may be a more *convenient* vehicle than treasury orders. But a little *difference* in the degree of *convenience* cannot constitute the necessity which the Constitution makes the ground for assuming any non-enumerated power.

Besides; the existing banks will, without a doubt, enter into arrangements for lending their agency, and the more favorable, as there will be a competition among them for it; whereas the bill delivers us up bound to the national bank, who are free to refuse all arrangement, but on their own terms, and the public not free, on such refusal, to employ any other bank. That of Philadelphia, I believe, now does this business, by their post-notes, which, by an arrangement with the treasury, are paid by any State collector to whom they are presented. This expedient alone suffices to prevent the existence of that *necessity* which may justify the assumption of a non-enumerated power as a means for carrying into effect an enumerated one. The thing may be done, and has been done, and well done, without this assumption; therefore, it does not stand on that degree of *necessity* which can honestly justify it.

It may be said that a bank whose bills would have a currency all over the States, would be more convenient than one whose currency is limited to a single State. So it would be still more convenient that there should be a bank, whose bills should have a currency all over the world. But it does not follow from this superior conveniency, that there exists anywhere a power to establish such a bank; or that the world may not go on very well without it.

Can it be thought that the Constitution intended that for a shade or two of *convenience*, more or less, Congress should be authorized to break down the most ancient and fundamental laws of the several States; such as those against Mortmain, the laws of Alienage, the rules of descent, the acts of distribution, the laws of escheat and forfeiture, the laws of monopoly? Nothing but a necessity invincible by any other means, can justify such a prostitution of laws, which constitute the pillars of our whole system of jurisprudence. Will Congress be too strait-laced to carry the Constitution into honest effect, unless they may pass over the foundation-laws of the State government for the slightest convenience of theirs?

The negative of the President is the shield provided by the Constitution to protect against the invasions of the legislature: 1. The right of the Executive. 2. Of the Judiciary. 3. Of the

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States and State legislatures. The present is the case of a right remaining exclusively with the States, and consequently one of those intended by the Constitution to be placed under its protection.

It must be added, however, that unless the President's mind on a view of everything which is urged for and against this bill, is tolerably clear that it is unauthorized by the Constitution; if the pro and the con hang so even as to balance his judgment, a just respect for the wisdom of the legislature would naturally decide the balance in favor of their opinion. It is chiefly for cases where they are clearly misled by error, ambition, or interest, that the Constitution has placed a check in the negative of the President.

HAMILTON'S OPINION AS TO THE CONSTITUTIONALITY OF THE BANK OF THE UNITED STATES, 1791.

The Secretary of the Treasury having perused with attention the papers containing the opinions of the Secretary of State and Attorney General, concerning the constitutionality of the bill for establishing a National Bank, proceeds, according to the order of the President, to submit the reasons which have induced him to entertain a different opinion.

It will naturally have been anticipated, that in performing this task, he would feel uncommon solicitude. Personal considerations alone, arising from the reflection that the measure originated with him, would be sufficient to produce it. The sense which he has manifested of the great importance of such an institution to the successful administration of the department under his particular care, and an expectation of serious ill consequences to result from a failure of the measure, do not permit him to be without anxiety on public accounts. But the chief solicitude arises from a firm persuasion, that principles of construction like those espoused by the Secretary of State and Attorney General, would be fatal to the just and indispensable authority of the United States.

In entering upon the argument, it ought to be premised that the objections of the Secretary of State and Attorney General are founded on a general denial of the authority of the United States to erect corporations. The latter, indeed, expressly admits, that if there be anything in the bill which is not warranted by the Constitution, it is the clause of incorporation.

Now it appears to the Secretary of the Treasury that this *general principle* is *inherent* in the very *definition* of government, and *essential* to every step of progress to be made by that of the United States, namely: That every power vested in a government is in its nature *sovereign*, and includes, by *force* of the *term*, a right to employ all the *means* requisite and fairly applicable to the attainment of the *ends* of such power, and which are not precluded by restrictions and exceptions specified in the Constitution, or not immoral, or not contrary to the *essential ends* of political society.

This principle, in its application to government in general, would be admitted as an axiom; and it will be incumbent upon those

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who may incline to deny it, to prove a distinction, and to show that a rule which, in the general system of things, is essential to the preservation of the social order, is inapplicable to the United States.

The circumstance that the powers of sovereignty are in this country divided between the National and State governments, does not afford the distinction required. It does not follow from this, that each of the portion of *powers* delegated to the one or to the other, is not sovereign with *regard to its proper objects*. It will only *follow* from it, that each has sovereign power as to *certain things*, and not as to *other things*. To deny that the government of the United States has sovereign power, as to its declared purposes and trusts, because its power does not extend to all cases, would be equally to deny that the State governments have sovereign power in any case, because their power does not extend to every case. The tenth section of the first article of the Constitution exhibits a long list of very important things which they may not do. And thus the United States would furnish the singular spectacle of a *political society* without *sovereignty*, or of a *people governed*, without *government*.

If it would be necessary to bring proof to a proposition so clear, as that which affirms that the powers of the federal government, as to *its objects*, were sovereign, there is a clause of its Constitution which would be decisive. It is that which declares that the Constitution, and the laws of the United States made in pursuance of it, and all treaties made, or which shall be made, under their authority, shall be the *supreme law of the land*. The power which can create the *supreme law of the land* in *any case*, is doubtless *sovereign* as to such case.

This general and indisputable principle puts at once an end to the *abstract* question, whether the United States have power to erect a *corporation;* that is to say, to give a *legal* or *artificial capacity* to one or more persons, distinct from the *natural*. For it is unquestionably incident to *sovereign power* to erect corporations, and consequently to *that* of the United States, in *relation* to the *objects* intrusted to the management of the government. The difference is this: where the authority of the government is general, it can create corporations in *all cases;* where it is confined to certain branches of legislation, it can create corporations *only* in those cases.

Here then, as far as concerns the reasonings of the Secretary of State and the Attorney General, the affirmative of the constitutionality of the bill might be permitted to rest. It will occur to the President, that the principle here advanced has been untouched by either of them.

For a more complete elucidation of the point, nevertheless, the arguments which they had used against the power of the government to erect corporations, however foreign they are to the great and fundamental rule which has been stated, shall be particularly examined. And after showing that they do not tend to impair its force, it shall also be shown that the power of incorporation, inci-

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dent to the government in certain cases, does fairly extend to the particular case which is the object of the bill.

The first of these arguments is, that the foundation of the Constitution is laid on this ground: "That all powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved for the States, or to the people." Whence it is meant to be inferred, that Congress can in no case exercise any power not included in those not enumerated in the Constitution. And it is affirmed, that the power of erecting a corporation is not included in any of the enumerated powers.

The main proposition here laid down, in its true signification is not to be questioned. It is nothing more than a consequence of this republican maxim, that all government is a delegation of power. But how much is delegated in each case, is a question of fact, to be made out by fair reasoning and construction, upon the particular provisions of the Constitution, taking as guides the general principles and general ends of governments.

It is not denied that there are *implied* as well as *express powers*, and that the *former* are as effectually delegated as the *latter*. And for the sake of accuracy it shall be mentioned, that there is another class of powers, which may be properly denominated *resulting powers*. It will not be doubted, that if the United States should make a conquest of any of the territories of its neighbors, they would possess sovereign jurisdiction over the conquered territory. This would be rather a result, from the whole mass of the powers of the government, and from the nature of political society, than a consequence of either of the powers specially enumerated.

But be this as it may, it furnishes a striking illustration of the general doctrine contended for; it shows an extensive case, in which a power of erecting corporations is either implied in, or would result from, some or all of the powers vested in the national government. The jurisdiction acquired over such conquered country would certainly be competent to any species of legislation.

To return:—It is conceded that *implied powers* are to be considered as delegated equally with *express ones*. Then it follows, that as a power of erecting a corporation may as well be *implied* as any other thing, it may as well be employed as an *instrument* or *mean* of carrying into execution any of the specified powers, as any other *instrument* or *mean* whatever. The only question must be, in this, as in every other case, whether the mean to be employed, or in this instance, the corporation to be erected, has a natural relation to any of the acknowledged objects or lawful ends of the government. Thus a corporation may not be erected by Congress for superintending the police of the city of Philadelphia, because they are not authorized to *regulate* the *police* of that city. But one may be erected in relation to the collection of taxes, or to the trade with foreign countries, or to the trade between the States, or with the Indian tribes; because it is the province of the federal government to *regulate* those objects, and because it is incident to a general *sovereign* or *legislative* power to *regulate* a thing, to employ

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all the means which relate to its regulation to the best and greatest advantage.

A strange fallacy seems to have crept into the manner of thinking and reasoning upon the subject. Imagination appears to have been unusually busy concerning it. An incorporation seems to have been regarded as some *great independent substantive thing;* as a political end of peculiar magnitude and moment; whereas it is truly to be considered as a *quality, capacity,* or *mean* to an end. Thus a mercantile company is formed, with a certain capital, for the purpose of carrying on a particular branch of business. Here the business to be prosecuted is the end. The association, in order to form the requisite capital, is the primary mean. Suppose that an incorporation were added to this, it would only be to add a new *quality* to that association, to give it an artificial capacity, by which it would be enabled to prosecute the business with more safety and convenience.

That the importance of the power of incorporation has been exaggerated, leading to erroneous conclusions, will further appear from tracing it to its origin. The Roman law is the source of it, according to which a *voluntary* association of individuals, at *any time,* or for any purpose, was capable of producing it. In England, whence our notions of it are immediately borrowed, it forms part of the executive authority, and the exercise of it has been often *delegated* by that authority. Whence, therefore, the ground of the supposition that it lies beyond the reach of all those very important portions of sovereign power, legislative as well as executive, which belongs to the government of the United States.

To this mode of reasoning respecting the right of employing all the means requisite to the execution of the specified powers of the government, it is objected, that none but necessary and proper means are to be employed; and the Secretary of State maintains, that no means are to be considered as *necessary* but those without which the grant of the power would be *nugatory.* Nay, so far does he go in his restrictive interpretation of the *word,* as even to make the case of *necessity* which shall warrant the constitutional exercise of the power to depend on *casual* and *temporary* circumstances; an idea which alone refutes the construction. The *expediency* of exercising a particular power, at a particular time, must, indeed, depend on circumstances; but the constitutional right of exercising it must be uniform and invariable, the same to-day as to-morrow.

All the arguments, therefore, against the constitutionality of the bill derived from the accidental existence of certain State banks,—institutions which happen to exist to-day, and, for aught that concerns the government of the United States, may disappear to-morrow,—must not only be rejected as fallacious, but must be viewed as demonstrative that there is a *radical* source of error in the reasoning.

It is essential to the being of the national government, that so erroneous a conception of the meaning of the word *necessary* should be exploded.

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It is certain that neither the grammatical nor popular sense of the term requires that construction. According to both, *necessary* often means no more than *needful, requisite, incidental, useful,* or *conducive to.* It is a common mode of expression to say, that it is *necessary* for a government or a person to do this or that thing, when nothing more is intended or understood, than that the interests of the government or person require, or will be promoted by, the doing of this or that thing. The imagination can be at no loss for exemplifications of the use of the word in this sense. And it is the true one in which it is to be understood as used in the Constitution. The whole turn of the clause containing it indicates, that it was the intent of the Convention, by that clause, to give a liberal latitude to the exercise of the specified powers. The expressions have peculiar comprehensiveness. They are, "to make all *laws* necessary and proper for *carrying into execution* the *foregoing powers,* and *all other powers* vested by the Constitution in the *government* of the United States, or in any *department* or *officer* thereof."

To understand the word as the Secretary of State does, would be to depart from its obvious and popular sense, and to give it a restrictive operation, an idea never before entertained. It would be to give it the same force as if the word *absolutely* or *indispensably* had been prefixed to it.

Such a construction would beget endless uncertainty and embarrassment. The cases must be palpable and extreme, in which it could be pronounced, with certainty, that a measure was absolutely necessary, or one, without which, the exercise of a given power would be nugatory. There are few measures of any government which would stand so severe a test. To insist upon it, would be to make the criterion of the exercise of any implied power, a *case of extreme necessity;* which is rather a rule to justify the overleaping of the bounds of constitutional authority, than to govern the ordinary exercise of it.

It may be truly said of every government, as well as of that of the United States, that it has only a right to pass such laws as are necessary and proper to accomplish the objects intrusted to it. For no government has a right to do *merely what it pleases.* Hence, by a process of reasoning similar to that of the Secretary of State, it might be proved that neither of the State governments has a right to incorporate a bank. It might be shown that all the public business of the state could be performed without a bank, and inferring thence that it was unnecessary, it might be argued that it could not be done, because it is against the rule which has been just mentioned. A like mode of reasoning would prove that there was no power to incorporate the inhabitants of a town, with a view to a more perfect police. For it is certain that an incorporation may be dispensed with, though it is better to have one. It is to be remembered that there is no *express* power in any State constitution to erect corporations.

The *degree* in which a measure is necessary, can never be a *test* of the legal right to adopt it; that must be a matter of opinion,

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and can only be a *test* of expediency. The *relation* between the *measure* and the *end;* between the *nature* of the *mean* employed toward the execution of a power, and the object of that power, must be the criterion of constitutionality, not the more or less of *necessity* or *utility*.

The practice of the government is against the rule of construction advocated by the Secretary of State. Of this, the Act concerning lighthouses, beacons, buoys, and public piers, is a decisive example. This, doubtless, must be referred to the powers of regulating trade, and is fairly relative to it. But it cannot be affirmed that the exercise of that power in this instance was strictly *necessity*, or that the power itself would be *nugatory*, without that of regulating establishments of this nature.

This restrictive interpretation of the word *necessary* is also contrary to this sound maxim of construction; namely, that the powers contained in a constitution of government, especially those which concern the general adminstration of the affairs of a country, its finances, trade, defense, etc., ought to be construed liberally in advancement of the public good. This rule does not depend on the particular form of a government, or on the particular demarcation of the boundaries of its powers, but on the nature and object of government itself. The means by which national exigencies are to be provided for, national inconveniences obviated, national prosperity promoted, are of such infinite variety, extent, and complexity, that there must of necessity be great latitude of discretion in the selection and application of those means. Hence, consequently, the necessity and propriety of exercising the authorities intrusted to a government on principles of liberal construction.

The Attorney General admits the *rule*, but takes a distinction between a State and the Federal Constitution. The latter, he thinks, ought to be construed with greater strictness, because there is more danger of error in defining *partial* than *general* powers. But the reason of the rule forbids such a distinction. This reason is, the variety and extent of public exigencies, a far greater proportion of which, and of a far more critical kind, are objects of *National* than of *State* administration. The greater danger of error, as far as it is supposable, may be a prudential reason for caution in practice, but it cannot be a rule of restrictive interpretation.

In regard to the clause of the Constitution immediately under consideration, it is admitted by the Attorney General, that no *restrictive* effect can be ascribed to it. He defines the word *necessary* thus: "To be *necessary* is to be *incidental*, and may be denominated the natural means of executing a power."

But while on the one hand the construction of the Secretary of State is deemed inadmissible, it will not be contended, on the other, that the clause in question gives any *new* or *independent* power. But it gives an explicit sanction to the doctrine of *implied powers*, and is equivalent to an admission of the proposition that the government, as to its *specified powers* and *objects*, has plenary and sovereign authority, in some cases paramount to the States; in others, co-ordinate with it. For such is the plain import of the

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declaration, that it may pass all *laws* necessary and proper to carry into execution those powers.

It is no valid objection to the doctrine to say, that it is calculated to extend the power of the government throughout the entire sphere of State legislation. The same thing has been said, and may be said, with regard to every exercise of power by *implication* or *construction*.

The moment the literal meaning is departed from, there is a chance of error and abuse. And yet an adherence to the letter of its powers would at once arrest the motions of government. It is not only agreed, on all hands, that the exercise of constructive powers is indispensable, but every act which has been passed, is more or less an exemplification of it. One has been already mentioned—that relating to lighthouses, etc.—that which declares the power of the President to remove officers at pleasure, acknowledges the same truth in another and a signal instance.

The truth is, that difficulties on this point are inherent in the nature of the Federal Constitution; they result inevitably from a division of the legislative power. The consequence of this division is, that there will be cases clearly within the power of the national government; others, clearly without its powers; and a third class, which will leave room for controversy and difference of opinion, and concerning which a reasonable latitude of judgment must be allowed.

But the doctrine which is contended for is not chargeable with the consequences imputed to it. It does not affirm that the national government is sovereign in all respects, but that it is sovereign to a certain extent; that is, to the extent of the objects of its specified powers.

It leaves, therefore, a criterion of what is constitutional, and of what is not so. This criterion is the *end*, to which the measure relates as a *mean*. If the *end* be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that *end*, and is not forbidden by any particular provision of the Constitution, it may safely be deemed to come within the compass of the national authority. There is also this further criterion, which may materially assist the decision: Does the proposed measure abridge a pre-existing right of any State or of any individual? If it does not, there is a strong presumption in favor of its constitutionality, and slighter relations to any declared object of the Constitution may be permitted to turn the scale.

The general objections, which are to be inferred from the reasonings of the Secretary of State and Attorney General, to the doctrine which has been advanced, have been stated, and it is hoped satisfactorily answered. Those of a more particular nature shall now be examined.

The Secretary of State introduces his opinion with an observation, that the proposed incorporation undertakes to create certain capacities, properties, or attributes, which are against the laws of *alienage*, *descents*, *escheat* and *forfeiture*, *distribution* and *monopoly*, and to confer a power to make laws paramount to those

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of the States. And nothing, says he, in another place, but *necessity, invincible* by *other means*, can justify such a *prostration* of laws, which constitute the pillars of our whole system of jurisprudence, and are the foundation laws of the State governments. If these are truly the foundation laws of the several States, then have most of them subverted their own foundations. For there is scarcely one of them which has not, since the establishment of its particular constitution, made material alterations in some of those branches of its jurisprudence, especially the law of descents. But it is not conceived how anything can be called the fundamental law of a State government which is not established in its constitution, unalterable by the ordinary legislature. And, with regard to the question of necessity, it has been shown that this can only constitute a question of expediency, not of right.

To erect a corporation, is to substitute a *legal* or *artificial* for a *natural* person, and where a number are concerned, to give them *individuality*. To that *legal* or *artificial* person, once created, the common law of every State, of itself, annexes all those incidents and attributes which are represented as a prostration of the main pillars of their jurisprudence.

It is certainly not accurate to say, that the erection of a corporation is *against* those different *heads* of the State laws; because it is rather to create a kind of person or entity, to which they are inapplicable, and to which the general rule of those laws assign a different regimen. The laws of alienage cannot apply to an artificial person, because it can have no country; those of descent cannot apply to it, because it can have no heirs; those of escheat are foreign from it, for the same reason; those of forfeiture, because it cannot commit a crime; those of distribution, because, though it may be dissolved, it cannot die.

As truly might it be said, that the exercise of the power of prescribing the rule by which foreigners shall be naturalized, is against the law of alienage, while it is, in fact, only to put them in a situation to cease to be the subject of that law. To do a thing which is against a law, is to do something which it forbids, or which is a violation of it.

But if it were even to be admitted that the erection of a corporation is a direct alteration of the state laws, in the enumerated particulars, it would do nothing toward proving that the measure was unconstitutional. If the government of the United States can do no act which amounts to an alteration of a State law, all its powers are nugatory; for almost every new law is an alteration, in some way or other, of an *old law*, either *common* or *statute*.

There are laws concerning bankruptcy in some States. Some States have laws regulating the values of foreign coins. Congress are empowered to establish uniform laws concerning bankruptcy throughout the United States, and to regulate the values of foreign coins. The exercise of either of these powers by Congress, necessarily involves an alteration of the laws of those States.

Again. Every person, by the common law of each State, may export his property to foreign countries, at pleasure. But Congress,

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in pursuance of the power of regulating trade, may *prohibit* the exportation of commodities; in doing which, they would alter the common law of each State, in abridgment of individual right.

It can therefore never be good reasoning to say this or that act is unconstitutional, because it alters this or that law of a State. It must be shown that the act which makes the alteration is unconstitutional on other accounts; not *because* it makes the alteration.

There are two points in the suggestions of the Secretary of State, which have been noted, that are peculiarly incorrect. One is, that the proposed incorporation is against the laws of monopoly, because it stipulates an exclusive right of banking under the national authority; the other, that it gives power to the institution to make laws paramount to those of the States.

But, with regard to the first: The bill neither prohibits any State from erecting as many banks as they please, nor any number of individuals from associating to carry on the business, and consequently, is free from the charge of establishing a monopoly; for monopoly implies a *legal impediment* to the carrying on of the trade by others than those to whom it is granted.

And with regard to the second point, there is still less foundation. The by-laws of such an institution as a bank can operate only on its own members—can only concern the disposition of its own property, and must essentially resemble the rules of a private mercantile partnership. They are expressly not to be contrary to law; and law must here mean the law of a State, as well as of the United States. There never can be a doubt, that a law of a corporation, if contrary to a law of a State, must be overruled as void, unless the law of the State is contrary to that of the United States, and then the question will not be between the law of the State and that of the corporation, but between the law of the State and that of the United States.

Another argument made use of by the Secretary of State is, the rejection of a proposition by the Convention to empower Congress to make corporations, either generally, or for some special purpose.

What was the precise nature or extent of this proposition, or what the reasons for refusing it, is not ascertained by any authentic document, or even by accurate recollection. As far as any such document exists, it specifies only canals. If this was the amount of it, it would, at most, only prove that it was thought inexpedient to give a power to incorporate for the purpose of opening canals, for which purpose a special power would have been necessary, except with regard to the western territory, there being nothing in any part of the Constitution respecting the regulation of canals. It must be confessed, however, that very different accounts are given of the import of the proposition, and of the motives for rejecting it. Some affirm, that it was confined to the opening of canals and obstructions in rivers; others, that it embraced banks; and others, that it extended to the power of incorporating generally. Some, again, allege, that it was disagreed to because it was thought improper to vest in Congress a power of erecting corporations. Others, because it was thought unnecessary to *specify* the power,

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and inexpedient to furnish an additional topic of objection to the Constitution. In this state of the matter, no inference whatever can be drawn from it.

But whatever may have been the nature of the proposition, or the reasons for rejecting it, nothing is included by it, that is, the proposition, in respect to the real merits of the question. The Secretary of State will not deny, that, whatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual and established rules of construction. Nothing is more common than for laws to *express* and *effect* more or less than was intended. If, then, a power to erect a corporation in any case be deducible, by fair inference, from the whole or any part of the numerous provisions of the Constitution of the United States, arguments drawn from extrinsic circumstances regarding the intention of the Convention must be rejected.

Most of the arguments of the Secretary of State, which have not been considered in the foregoing remarks, are of a nature rather to apply to the expediency than to the constitutionality of the bill. They will, however, be noticed in the discussions which will be necessary in reference to the particular heads of the powers of the government which are involved in the question.

Those of the Attorney General will now properly come under view.

His first objection is, that the power of incorporation is not *expressly* given to Congress. This shall be conceded, but in *this sense only*, that it is not declared in *express terms* that Congress may erect a corporation. But this cannot mean, that there are not certain *express powers* which *necessarily* include it. For instance, Congress have express power to exercise exclusive legislation, in all cases whatsoever, over such *district* (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the government of the United States; and to exercise *like authority* over all places purchased, by consent of the legislature of the State in which the same shall be, for the erection of forts, arsenals, dock-yards, and other needful buildings. Here, then, is express power to exercise *exclusive legislation*, in *all cases whatsoever*, over *certain places;* that is, to do, in respect to those places, all that any government whatsoever may do. For language does not afford a more complete designation of sovereign power than in those comprehensive terms. It is, in other words, a power to pass all laws whatsoever, and, consequently, to pass laws for erecting corporations, as well as for any other purpose which is the proper object of law in a free government.

Surely it can never be believed that Congress, with *exclusive powers of legislation in all cases* whatsoever, cannot erect a corporation within the district which shall become the seat of government, for the better regulation of its police. And yet there is an unqualified denial of the power to erect corporations in every case, on the part both of the Secretary of State and of the Attorney

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General; the former, indeed, speaks of that power in these emphatical terms: That it is a *right remaining exclusively with the States.*

As far, then, as there is an *express power* to do any *particular act of legislation*, there is an *express one* to erect a corporation in the case above described. But, accurately speaking, no *particular power* is more than *that implied in a general one.* Thus the power to lay a duty on a *gallon of rum* is only a particular *implied* in the general power to collect taxes, duties, imposts, and excises. This serves to explain in what sense it may be said that Congress have not an express power to make corporations.

This may not be an improper place to take notice of an argument which was used in debate in the House of Representatives. It was there argued, that if the Constitution intended to confer so important a power as that of erecting corporations, it would have been expressly mentioned. But the case which has been noticed is clearly one in which such a power exists, and yet without any specification of express grant of it, further than as every *particular implied* in a general power can be said to be so granted.

But the argument itself is founded upon an exaggerated and erroneous conception of the nature of the power. It has been shown that it is not of so transcendent a kind as the reasoning supposes, and that, viewed in a just light, it is a mean, which ought to have been left to *implication*, rather than an end, which ought to have been expressly granted.

Having observed that the power of erecting corporations is not expressly granted to Congress, the Attorney General proceeds thus:—

"If it can be exercised by them, it must be—

"1. Because the nature of the federal government implies it.

"2. Because it is involved in some of the specified powers of legislation.

"3. Because it is necessary and proper to carry into execution some of the specified powers."

To be implied in the *nature* of the *federal government*, says he, would beget a doctrine so indefinite as to grasp every power.

This proposition, it ought to be remarked, is not precisely, or even substantially, that which has been relied upon. The proposition relied upon is, that the *specified powers of Congress* are in their nature *sovereign.* That it is incident to sovereign power to erect corporations, and that therefore Congress have a right, within the *sphere* and in *relation* to the *objects of their power*, to *erect corporations.* It shall, however, be supposed that the Attorney General would consider the two propositions in the same light, and that the objection made to the one would be made to the other.

To this objection an answer has been already given. It is this, that the doctrine is stated with this *express qualification*, that the right to erect corporations does *only* extend to *cases* and *objects* within the *sphere* of the *specified powers* of the *government.* A

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general legislative authority implies a power to erect corporations in *all cases*. A *particular* legislative power implies authority to erect corporations in relation to cases arising under *that power only*. Hence the affirming that, as *incident* to sovereign power, Congress may erect a corporation in relation to the *collection* of their taxes, is no more to affirm that they may do whatever else they please,—than the saying that they have a power to regulate trade, would be to affirm that they have a power to regulate religion; or than the maintaining that they have sovereign power as to taxation, would be to maintain that they have sovereign power as to everything else.

The Attorney General undertakes in the next place to show, that the power of erecting corporations is not involved in any of the specified powers of legislation confided to the national government. In order to this, he has attempted an enumeration of the particulars, which he supposes to be comprehended under the several heads of the *powers* to lay and collect taxes, &c.; to borrow money on the credit of the United States; to regulate commerce with sovereign nations; between the States, and with the Indian tribes; to dispose of and make all needful rules and regulations respecting the territory of other property belonging to the United States. The design of which enumeration is to show, *what* is included under those different heads of power, and negatively, that the power of erecting corporations is not included.

The truth of this inference or conclusion must depend on the accuracy of the enumeration. If it can be shown that the enumeration is *defective*, the inference is destroyed. To do this will be attended with no difficulty.

The heads of the power to lay and collect taxes are stated to be:

1. To stipulate the sum to be lent.
2. An interest or no interest to be paid.
3. The time and manner of repaying, unless the loan be placed on an irredeemable fund.

This enumeration is liable to a variety of objections. It omits in the first place, the *pledging* or *mortgaging* of a fund for the security of the money lent, an usual, and in most cases an essential ingredient.

The idea of a stipulation of an *interest* or no *interest* is too confined. It should rather have been said, to stipulate the *consideration* of the loan. Individuals often borrow on considerations other than the payment of interest, so may governments, and so they often find it necessary to do. Everyone recollects the lottery tickets and other douceurs often given in Great Britain as collateral inducements to the lending of money to the government. There are also frequently collateral conditions, which the enumeration does not contemplate. Every contract which has been made for moneys borrowed in Holland, induces stipulations that the sum due shall be *free* from *taxes*, and from sequestration in time of war, and mortgages all the land and property of the United States for the reimbursement.

It is also known that a lottery is a common expedient for bor-

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rowing money, which certainly does not fall under either of the enumerated heads.

The heads of the power to regulate commerce with foreign nations, are stated to be:

1. To prohibit them or their commodities from our ports.

2. To impose duties on them, where none existed before, or to increase *existing* duties on them.

3. To subject *them* to any species of custom-house regulation.

4. To grant *them* any exemptions or privileges which policy may suggest.

This enumeration is far more exceptionable than either of the former. It omits *everything* that relates to the *citizens' vessels*, or *commodities* of the United States.

The following palpable omissions occur at once:

1. Of the power to prohibit the exportation of commodities, which not only exists at all times, but which in time of war it would be necessary to exercise, particularly with relation to naval and warlike stores.

2. Of the power to prescribe rules concerning the *characteristics* and privileges of an American bottom; how she shall be navigated, or whether by citizens or foreigners, or by a proportion of each.

3. Of the power of regulating the manner of contracting with seamen; the police of ships on their voyages, &c., of which the Act for the government and regulation of seamen, in the merchants' service, is a specimen.

That the three preceding articles are omissions, will not be doubted—there is a long list of items in addition, which admit of little, if any question, of which a few samples shall be given.

1. The granting of bounties to certain kinds of vessels, and certain species of merchandise; of this nature, is the allowance on dried and pickled fish and salted provisions.

2. The prescribing of rules concerning the *inspection* of commodities to be exported. Though the States individually are competent to this regulation, yet there is no reason, in point of authority at least, why a general system might not be adopted by the United States.

3. The regulation of policies of insurance; of salvage upon goods found at sea, and the disposition of such goods.

4. The regulation of pilots.

5. The regulation of bills of exchange drawn by a merchant of *one State* upon a merchant of *another State*. This last rather belongs to the regulation of trade between the States, but is equally omitted in the specifications under that head.

The last enumeration relates to the power to dispose of, and make all *needful rules* and *regulations* respecting the territory or *other property* belonging to the United States.

The heads of this power are said to be:

1. To exert an ownership over the territory of the United States which may be properly called the property of the United States, as in the western territory, and to *institute a government therein*, or

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2. To exert an ownership over the other property of the United States.

The idea of exerting an ownership over the territory or other property of the United States, is particularly indefinite and vague. It does not at all satisfy the conception of what must have been intended by a power to make all *needful rules* and *regulations*, nor would there have been any use for a special clause, which authorized nothing more. For the right of exerting an ownership is implied in the very definition of property. It is admitted, that in regard to the western territory, something more is intended; even the institution of a government, that is, the creation of a body politic, or corporation of the highest nature; one which, in its maturity, will be able itself to create other corporations. Why, then, does not the same clause authorize the erection of a corporation, in respect to the regulation or disposal of any other of the property of the United States.

This idea will be enlarged upon in another place.

Hence it appears, that the enumerations which have been attempted by the Attorney General, are so imperfect, as to authorize no conclusion whatever; they, therefore, have no tendency to disprove that each and every of the powers, to which they relate, includes that of erecting corporations, which they certainly do, as the subsequent illustrations will more and more evince.

It is presumed to have been satisfactorily shown in the course of the preceding observations:

1. That the power of the government, *as* to the objects intrusted to its management, is, in its nature, sovereign.

2. That the right of erecting corporations is one inherent in, and inseparable from, the idea of sovereign power.

3. That the position, that the government of the United States can exercise no power, but such as is delegated to it by its Constitution, does not militate against this principle.

4. That the word *necessary*, in the general clause, can have no *restrictive* operation derogating from the force of this principle; indeed, that the degree in which a measure is or is not *necessary*, cannot be a *test* of *constitutional right*, but of *expediency only*.

5. That the power to erect corporations is not to be considered as an *independent* or *substantive* power, but as an *incidental* and *auxiliary* one, and was therefore more properly left to implication, than expressly granted.

6. That the principle in question does not extend the power of the government beyond the prescribed limits, because it only affirms a power to *incorporate* for purposes *within the sphere* of the *specified powers*.

And lastly, that the right to exercise such a power in certain cases is unequivocally granted in the most *positive* and *comprehensive* terms. To all which it only remains to be added, that such a power has actually been exercised in two very eminent instances; namely, in the erection of two governments; one northwest of the River Ohio, and the other southwest—the last independent of any antecedent compact. And these result in a full and complete

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demonstration, that the Secretary of State and the Attorney General are mistaken when they deny generally the power of the national government to erect corporations.

It shall now be endeavored to be shown that there is a power to erect one of the kind proposed by the bill. This will be done by tracing a natural and obvious relation between the institution of a bank and the objects of several of the enumerated powers of the government; and by showing that, *politically* speaking, it is necessary to the effectual execution of one or more of those powers.

In the course of this investigation, various instances will be stated, by way of illustration of a right to erect corporations under those powers.

Some preliminary observations may be proper.

The proposed bank is to consist of an association of persons, for the purpose of creating a joint capital, to be employed chiefly and essentially in loans. So far the object is not only lawful, but it is the mere exercise of a right which the law allows to every individual. The Bank of New York, which is not incorporated, is an example of such an association. The bill proposed in addition that the government shall become a joint proprietor in this undertaking, and that it shall permit the bills of the company, payable on demand, to be receivable in its revenues; and stipulates that it shall not grant privileges, similar to those which are to be allowed to this company, to any others. All this is incontrovertibly within the compass of the discretion of the government. The only question is, whether it has a right to incorporate this company, in order to enable it the more effectually to accomplish ends which are in themselves lawful.

To establish such a right, it remains to show the relation of such an institution to one or more of the specified powers of the government. Accordingly it is affirmed that it has a relation, more or less direct, to the power of collecting taxes, to that of borrowing money, to that of regulating trade between the States, and to those of raising and maintaining fleets and armies. To the two former the relation may be said to be immediate; and in the last place it will be argued, that it is clearly within the provision which authorizes the making of all *needful rules and regulations* concerning the *property* of the United States, as the same has been practiced upon by the government.

A bank relates to the collection of taxes in two ways—indirectly, by increasing the quantity of circulating medium and quickening circulation, which facilitates the means of paying directly, by creating a *convenient species* of medium in which they are to be paid.

To designate or appoint the *money* or *thing* in which taxes are to be paid, is not only a proper, but a *necessary exercise* of the power of collecting them. Accordingly Congress, in the law concerning the collection of the duties on imposts and tonnage, have provided that they shall be paid in gold and silver. But while it was an indispensable part of the work to say in what they should be

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paid, the choice of the specific thing was mere matter of discretion. The payment might have been required in the commodities themselves. Taxes in kind, however ill-judged, are not without precedents, even in the United States; or it might have been in the paper money of the several States, or in the bills of the Bank of North America, New York and Massachusetts, all or either of them; or it might have been in bills issued under the authority of the United States.

No part of this can, it is presumed, be disputed. The appointment, then, of the *money* or *thing* in which the taxes are to be paid, is an incident to the power of collection. And among the expedients which may be adopted, is that of bills issued under the authority of the United States.

Now, the manner of issuing these bills is again matter of discretion. The government might doubtless proceed in the following manner:

It might provide that they should be issued under the direction of certain officers, payable on demand; and, in order to support their credit, and give them a ready circulation, it might, besides giving them a currency in its taxes, set apart, out of any moneys in its treasury, a given sum, and appropriate it, under the direction of those officers, as a fund for answering the bills, as presented for payment.

The constitutionality of all this would not admit of a question, and yet it would amount to the institution of a bank, with a view to the more convenient collection of taxes. For the simplest and most precise idea of a bank is, a deposit of coin, or other property, as a fund for *circulating credit* upon it, which is to answer the purpose of money. That such an arrangement would be equivalent to the establishment of a bank, would become obvious, if the place where the fund to be set apart was kept should be made a receptacle of the moneys of all other persons who should incline to deposit them there for safe-keeping; and would become still more so, if the officers charged with the direction of the fund were authorized to make discounts at the usual rate of interest, upon good security. To deny the power of the government to add these ingredients to the plan, would be to refine away all government.

A further process will still more clearly illustrate the point. Suppose, when the species of bank which has been described was about to be instituted, it was to be urged that, in order to secure to it a due degree of confidence, the fund ought not only to be set apart and appropriated generally, but ought to be specifically vested in the officers who were to have the direction of it, and in their *successors* in office, to the end that it might acquire the character of *private property*, incapable of being resumed without a violation of the sanctions by which the rights of property are protected, and occasioning more serious and general alarm—the apprehension of which might operate as a check upon the government. Such a proposition might be opposed by arguments against the expedience of it, or the solidity of the reason assigned

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for it, but it is not conceivable what could be urged against its constitutionality; and yet such a disposition of the thing would amount to the erection of a corporation; for the true definition of a corporation seems to be this: It is a *legal* person, or a person created by act of law, consisting of one or more natural persons authorized to hold property, or a franchise in succession, in a legal, as contradistinguished from natural, capacity.

Let the illustration proceed a step further. Suppose a bank of the nature which has been described, with or without incorporation, had been instituted, and that experience had evinced, as it probably would, that, being wholly under a public direction, it possessed not the confidence requisite to the credit of the bills. Suppose, also, that, by some of those adverse conjunctures which occasionally attend nations, there had been a very great drain of the specie of the country, so as not only to cause general distress for want of an adequate medium of circulation, but to produce, in consequence of that circumstance, considerable defalcations in the public revenues. Suppose, also, that there was no bank instituted in any State; in such a posture of things, would it not be most manifest, that the incorporation of a bank like that proposed by the bill would be a measure immediately relative to the *effectual collection* of the taxes, and completely within the province of the sovereign power of providing, by all laws necessary and proper, for that collection? If it be said, that such a state of things would render that necessary, and therefore constitutional, which is not so now, the answer to this, and a solid one it doubtless is, must still be that which has been already stated—circumstances may affect the expediency of the measure, but they can neither add to nor diminish its constitutionality.

A bank has a direct relation to the power of borrowing money, because it is an usual, and in sudden emergencies an essential, instrument in the obtaining of loans to government.

A nation is threatened with a war; large sums are wanted on a sudden to make the requisite preparations. Taxes are laid for the purpose, but it requires time to obtain the benefit of them. Anticipation is indispensable. If there be a bank the supply can at once be had. If there be none, loans from individuals must be sought. The progress of these is often too slow for the exigency; in some situations they are not practicable at all. Frequently, when they are, it is of great consequence to be able to anticipate the product of them by advance from a bank.

The essentiality of such an institution as an instrument of loans is exemplified at this very moment. An Indian expedition is to be prosecuted. The only fund, out of which the money can arise, consistently with the public engagements, is a tax, which only begins to be collected in July next. The preparations, however, are instantly to be made. The money must, therefore, be borrowed—and of whom could it be borrowed if there were no public banks?

It happens that there are institutions of this kind, but if there were none, it would be indispensable to create one.

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Let it then be supposed that the necessity existed, (as but for a casualty would be the case,) that proposals were made for obtaining a loan; that a number of individuals came forward and said, we are willing to accommodate the government with the money; with what we have in hand, and the credit we can raise upon it, we doubt not of being able to furnish the sum required; but in order to this, it is indispensable that we should be incorporated as a bank. This is essential toward putting it in our power to do what is desired, and we are obliged on that account to make it the *consideration* or *condition* of the loan.

Can it be believed that a compliance with this proposition would be unconstitutional? Does not this alone evince the contrary? It is a necessary part of a power to borrow, to be able to stipulate the consideration or conditions of a loan. It is evident, as has been remarked elsewhere, that this is not confined to the mere stipulation of a *franchise*. If it may, and it is not perceived why it may not, then the grant of a corporate capacity may be stipulated as a consideration of the loan. There seems to be nothing unfit or foreign from the nature of the thing in giving individuality, or a corporate capacity to a number of persons, who are willing to lend a sum of money to the government, the better to enable them to do it, and make them an ordinary instrument of loans in future emergencies of the state. But the more general view of the subject is still more satisfactory. The legislative power of borrowing money, and of making all laws necessary and proper for carrying into execution that power, seems obviously competent to the appointment of the *organ*, through which the abilities and wills of individuals may be most efficaciously exerted for the accommodation of the government by loans.

The Attorney General opposes to this reasoning the following observation:—"Borrowing money presupposes the accumulation of a fund to be lent, and is secondary to the creation of an ability to lend." This is plausible in theory, but is not true in fact. In a great number of cases, a previous accumulation of a fund equal to the whole sum required does not exist. And nothing more can be actually presupposed, than that there exist resources, which, put into activity to the greatest advantage by the nature of the operation with the government, will be equal to the effect desired to be produced. All the provisions and operations of government must be presumed to contemplate things as they *really* are.

The institution of a bank has also a natural relation to the regulation of trade between the States, in so far as it is conducive to the creation of a convenient medium of *exchange* between them, and to the keeping up a full circulation, by preventing the frequent displacement of the metals in reciprocal remittances. Money is the very hinge on which commerce turns. And this does not merely mean gold and silver; many other things have served the purpose, with different degrees of utility. Paper has been extensively employed.

It cannot, therefore, be admitted, with the Attorney General,

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that the regulation of trade between the States, as it concerns the medium of circulation and exchange, ought to be considered as confined to coin. It is even supposable that the whole, or the greatest part, of the coin of the country might be carried out of it.

The Secretary of State objects to the relation here insisted upon, by the following mode of reasoning :—To erect a bank, says he, and to regulate commerce, are very different acts. He who creates a bank, creates a subject of commerce; so does he who makes a bushel of wheat, or digs a dollar out of the mines; yet neither of these persons regulates commerce thereby. To make a thing which may be bought and sold, is not to prescribe regulations for *buying* and *selling*.

This making the regulation of commerce to consist in prescribing rules for *buying* and *selling*—this, indeed, is a species of regulation of trade, but is one which falls more aptly within the province of the local jurisdictions than within that of the general government, whose care they must be presumed to have been intended to be directed to those general political arrangements concerning trade on which its aggregated interests depend, rather than to the details of *buying* and *selling*. Accordingly, such only are the regulations to be found in the laws of the United States, whose objects are to give encouragement to the enterprise of our own merchants, and to advance our navigation and manufactures. And it is in reference to these general relations of commerce, that an establishment which furnishes facilities to circulation, and a convenient medium of exchange and alienation, is to be regarded as a regulation of trade.

The Secretary of State further argues, that if this was a regulation of commerce, it would be void, as *extending as much to the internal commerce of every State as to its external*. But what regulation of commerce does not extend to the internal commerce of every State? What are all the duties upon imported articles, amounting to prohibitions, but so many bounties upon domestic manufactures, affecting the interests of different classes of citizens, in different ways? What are all the provisions in the Coasting Acts which relate to the trade between district and district of the same State? In short, what regulation of trade between the States but must affect the internal trade of each State? What can operate upon the whole, but must extend to every part?

The relation of a bank to the execution of the powers that concern the common defense has been anticipated. It has been noted, that, at this very moment, the aid of such an institution is essential to the measures to be pursued for the protection of our frontiers.

It now remains to show, that the incorporation of a bank is within the operation of the provision which authorizes Congress to make all needful rules and regulations concerning the property of the United States. But it is previously necessary to advert to a distinction which has been taken by the Attorney General.

He admits that the word *property* may signify personal prop-

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erty, however acquired, and yet asserts that it cannot signify money arising from the sources of revenue pointed out in the Constitution, "because," says he, "the disposal and regulation of money is the final cause for raising it by taxes."

But it would be more accurate to say that the *object* to which money is intended to be applied is the *final cause* for raising it, than that the disposal and regulation of it is *such*.

The support of government—the support of troops for the common defense—the payment of the public debt, are the true *final causes* for raising money. The disposition and regulation of it, when raised, are the steps by which it is applied to the *ends* for which it was raised, not the *ends* themselves. Hence, therefore, the money to be raised by taxes, as well as any other personal property, must be supposed to come within the meaning, as they certainly do within the letter, of authority to make all needful rules and regulations concerning the property of the United States.

A case will make this plainer. Suppose the public debt discharged, and the funds now pledged for it liberated. In some instances it would be found expedient to repeal the taxes; in others, the repeal might injure our own industry, our agriculture and manufactures. In these cases they would, of course, be retained. Here, then, would be moneys arising from the authorized sources of revenue, which would not fall within the rule by which the Attorney General endeavors to except them from other personal property, and from the operation of the clause in question. The moneys being in the coffers of government, what is to hinder such a disposition to be made of them as is contemplated in the bill; or what an incorporation of the parties concerned, under the clause which has been cited?

It is admitted that with regard to the western territory they give a power to erect a corporation—that is, to institute a government; and by what rule of construction can it be maintained, that the same words in a constitution of government will not have the same effect when applied to one species of property as to another, as far as the subject is capable of it?—Or that a legislative power to make all needful rules and regulations, or to pass all laws necessary and proper, concerning the public property, which is admitted to authorize an incorporation in one case, will not authorize it in another?—will justify the institution of a government over the western territory, and will not justify the incorporation of a bank for the more useful management of the moneys of the United States? If it will do the last, as well as the first, then, under this provision alone, the bill is constitutional, because it contemplates that the United States shall be joint proprietors of the stock of the bank.

There is an observation of the Secretary of State to this effect, which may require notice in this place:—Congress, says he, are not to lay taxes *ad libitum, for any purpose they please*, but only to pay the debts or provide for the welfare of the Union. Certainly no inference can be drawn from this against the power of

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applying their money for the institution of a bank. It is true that they cannot without breach of trust lay taxes for any other purpose than the general welfare; but so neither can any other government. The welfare of the community is the only legitimate end for which money can be raised on the community. Congress can be considered as under only one restriction which does not apply to other governments,—they cannot rightfully apply the money they raise to any purpose merely or purely local.

But, with this exception, they have as large a discretion in relation to the application of money as any legislature whatever. The constitutional *test* of a right application must always be, whether it be for a purpose of *general* or *local* nature. If the former, there can be no want of constitutional power. The quality of the object, as how far it will really promote or not the welfare of the Union, must be matter of conscientious discretion, and the arguments for or against a measure in this light must be arguments concerning expediency or inexpediency, not constitutional right. Whatever relates to the general order of the finances, to the general interests of trade, etc., being general objects, are constitutional ones for the *application of money*.

A bank, then, whose bills are to circulate in all the revenues of the country, is *evidently* a *general* object, and, for that very reason, a constitutional one, as far as regards the appropriation of money to it. Whether it will really be a beneficial one or not, is worthy of careful examination, but is no more a constitutional point, in the particular referred to, than the question, whether the western lands shall be sold for twenty or thirty cents per acre.

A hope is entertained that it has, by this time, been made to appear, to the satisfaction of the President, that a bank has a natural relation to the power of collecting taxes—to that of regulating trade—to that of providing for the common defense—and that, as the bill under consideration contemplates the government in the light of a joint proprietor of the stock of the bank, it brings the case within the provision of the clause of the Constitution which immediately respects the property of the United States.

Under a conviction that such a relation subsists, the Secretary of the Treasury, with all deference, conceives, that it will result as a necessary consequence from the position, that all the special powers of government are sovereign, as to the proper objects; that the incorporation of a bank is a constitutional measure; and that the objections taken to the bill, in this respect, are ill-founded.

But, from an earnest desire to give the utmost possible satisfaction to the mind of the President, on so delicate and important a subject, the Secretary of the Treasury will ask his indulgence, while he gives some additional illustrations of cases in which a power of erecting corporations may be exercised, under some of those heads of the specified powers of the government, which are alleged to include the right of incorporating a bank.

1. It does not appear susceptible of a doubt, that if Congress had thought proper to provide, in the collection laws, that the

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bonds to be given for the duties should be given to the collector of the district, A or B, as the case might require, to inure to him and his successors in office, in trust for the United States, that it would have been consistent with the Constitution to make such an arrangement; and yet this, it is conceived, would amount to an incorporation.

2. It is not an unusual expedient of taxation to farm particular branches of revenue—that is, to mortgage or sell the product of them for certain definite sums, leaving the collection to the parties to whom they are mortgaged or sold. There are even examples of this in the United States. Suppose that there was any particular branch of revenue which it was manifestly expedient to place on this footing, and there were a number of persons willing to engage with the government, upon condition that they should be incorporated, and the sums invested in them, as well for their greater safety, as for the more convenient recovery and management of the taxes. Is it supposable that there could be any constitutional obstacle to the measure? It is presumed that there could be none. It is certainly a mode of collection which it would be in the discretion of the government to adopt, though the circumstances must be very extraordinary that would induce the Secretary to think it expedient.

3. Suppose a new and unexplored branch of trade should present itself, with some foreign country. Suppose it was manifest that to undertake it with advantage required an union of the capitals of a number of individuals, and that those individuals would not be disposed to embark without an incorporation, as well to obviate that consequence of a private partnership which makes every individual liable in his whole estate for the debts of the company, to their utmost extent, as for the more convenient management of the business—what reason can there be to doubt that the national government would have a constitutional right to institute and incorporate such a company? None. They possess a general authority to regulate trade with foreign countries. This is a mean which has been practiced to that end, by all the principal commercial nations, who have trading companies to this day, which have subsisted for centuries. Why may not the United States, *constitutionally*, employ the *means* usual in other countries, for attaining the *ends* intrusted to them?

A power to make all needful rules and regulations concerning territory, has been construed to mean a power to erect a government. A power to regulate trade, is a power to make all needful rules and regulations concerning trade. Why may it not, then, include that of erecting a trading company, as well as, in other cases, to erect a government?

It is remarkable that the State conventions, who had proposed amendments in relation to this point, have most, if not all of them, expressed themselves nearly thus: Congress shall not grant monopolies, nor *erect any company* with exclusive advantages of commerce! Thus, at the same time, expressing their sense, that the power to erect trading companies or corporations was inherent

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in Congress, and objecting to it no further than as to the grant of *exclusive* privileges.

The Secretary entertains all the doubts which prevail concerning the utility of such companies, but he cannot fashion to his own mind a reason, to induce a doubt, that there is a constitutional authority in the United States to establish them. If such a reason were demanded, none could be given, unless it were this: That Congress cannot erect a corporation. Which would be no better than to say, they cannot do it, because they cannot do it—first presuming an inability, without reason, and then assigning that inability as the cause of itself. Illustrations of this kind might be multiplied without end. They shall, however, be pursued no further.

There is a sort of evidence on this point, arising from an aggregate view of the Constitution, which is of no inconsiderable weight: the very general power of laying and collecting taxes, and appropriating their proceeds—that of borrowing money indefinitely—that of coining money, and regulating foreign coins—that of making all needful rules and regulations respecting the property of the United States. These powers combined, as well as the reason and nature of the thing, speak strongly this language: that it is the manifest design and scope of the Constitution to vest in Congress all the powers requisite to the effectual adminstration of the finances of the United States. As far as concerns this object, there appears to be no parsimony of power.

To suppose, then, that the government is precluded from the employment of so usual and so important an instrument for the administration of its finances as that of a bank, is to suppose what does not coincide with the general tenor and complexion of the constitution, and what is not agreeable to impressions that any new spectator would entertain concerning it.

Little less than a prohibitory clause can destroy the strong presumptions which result from the general aspect of the government. Nothing but demonstration should exclude the idea that the power exists.

In all questions of this nature, the practice of mankind ought to have great weight against the theories of individuals.

The fact, for instance, that all the principal commercial nations have made use of trading corporations or companies, for the purpose of *external commerce*, is a satisfactory proof that the establishment of them is an incident to the regulation of the commerce.

This other fact, that banks are an usual engine in the administration of national finances, and an ordinary and the most effectual instrument of loan, and one which, in this country, has been found essential, pleads strongly against the supposition that a government, clothed with most of the most important prerogatives of sovereignty in relation to its revenues, its debts, its credits, its defense, its trade, its intercourse with foreign nations, is forbidden to make use of that instrument as an appendage to its own authority.

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It has been stated as an auxiliary test of constitutional authority to try whether it abridges any pre-existing right of any State, or any individual. The proposed investigation will stand the most severe examination on this point. Each State may still erect as many banks as it pleases. Every individual may still carry on the banking business to any extent he pleases.

Another criterion may be this. Whether the institution or thing has a more direct relation, as to its uses, to the objects of the reserved powers of the State governments than to those of the powers delegated by the United States. This, rule, indeed, is less precise than the former; but it may still serve as some guide. Surely a bank has more reference to the objects intrusted to the national government than to those left to the care of the State governments. The common defense is decisive in this comparison.

It is presumed that nothing of consequence in the observations of the Secretary of State, and Attorney General, has been left unnoticed.

There are, indeed, a variety of observations of the Secretary of State designed to show that the utilities ascribed to a bank, in relation to the collection of taxes, and to trade, could be obtained without it; to analyze which, would prolong the discussion beyond all bounds. It shall be forborne for two reasons. First, because the report concerning the bank, may speak for itself in this respect; and secondly, because all those observations are grounded on the erroneous idea that the *quantum* of necessity or utility is the *test* of a constitutional exercise of power.

One or two remarks only shall be made. One is, that he has taken no notice of a very essential advantage to trade in general, which is mentioned in the report, as peculiar to the existence of a bank circulation, equal in the public estimation to gold and silver. It is this that renders it unnecessary to lock up the money of the country, to accumulate for months successively, in order to the periodical payment of interest. The other is this: that his arguments to show that treasury orders and bills of exchange, from the course of trade, will prevent any considerable displacement of the metals, are founded on a particular view of the subject. A case will prove this. The sums collected in a State may be small in comparison with the debt due to it; the balance of its trade, direct and circuitous with the seat of government, may be even, or nearly so; here, then, without bank bills, which in that State answer the purpose of coin, there must be a displacement of the coin, in proportion to the difference between the sum collected in the State, and that to be paid in it. With bank bills, no such displacement would take place, or as far as it did, it would be gradual and insensible. In many other ways, also, would there be at least a temporary and inconvenient displacement of the coin, even where the course of trade would eventually return it to its proper channel.

The difference of the two situations in point of convenience to the treasury, can only be appreciated by one, who experiences the

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embarrassments of making provision for the payment of the interest on a stock, continually changing place in thirteen different places.

One thing which has been omitted, just occurs, although it is not very material to the main argument. The Secretary of State affirms that the bill only contemplates a repayment, not a loan, to the government. But here he is certainly mistaken. It is true the government invests in the stock of the bank a sum equal to that which it receives on loan. But let it be remembered, that it does not, therefore, cease to be a proprietor of the stock, which would be the case, if the money received back were in the nature of a payment. It remains a proprietor still, and will share in the profit or loss of the institution, according as the dividend is more or less than the interest it is to pay on the sum borrowed. Hence that sum is manifestly, and in the strictest sense, a loan.

KENTUCKY RESOLUTIONS OF 1798.[1]

The House, according to the standing order of the day, resolved itself into a committee of the whole on the state of the commonwealth, Mr. Caldwell in the chair, and after some time spent therein, the Speaker resumed the chair, and Mr. Caldwell reported that the committee had, according to order, had under consideration the Governor's address, and had come to the following resolutions thereupon, which he delivered in at the clerk's table, where they were twice read and agreed to by the House.

1. *Resolved*, That the several states composing the United States of America, are not united on the principle of unlimited submission to their general government; but that by compact, under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each state to itself, the residuary mass of right to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force: That to this compact each state acceded as a state, and is an integral party, its co-states forming as to itself, the other party: That the government created by this compact was not made the exclusive or final *judge* of the extent of the powers delegated to itself; since that would have made its discretion, and not the Constitution, the measure of its powers; but that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions, as of the mode and measure of redress.

2. *Resolved*, That the Constitution of the United States having delegated to Congress a power to punish treason, counterfeiting the securities and current coin of the United States, piracies and felonies committed on the high seas, and offenses against the laws

[1] Drafted by Thomas Jefferson.

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of nations, and no other crimes whatever, and it being true as a general principle and one of the amendments to the Constitution having also declared, "that the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people;" therefore, also, the same act of Congress, passed on the 14th day of July, 1798, and entitled, "an act in addition to the act entitled, an act for the punishment of certain crimes against the United States"; as also the act passed by them on the 27th day of June, 1798, entitled, "an act to punish frauds committed on the Bank of the United States," (and all other their acts which assume to create, define, and punish crimes other than those enumerated in the Constitution,) are altogether void, and of no force, and that the power to create, define, and punish such other crimes is reserved, and of right appertains, solely and exclusively, to the respective states, each within its own territory.

3. *Resolved*, That it is true as a general principle, and is also expressly declared by one of the amendments to the Constitution, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people"; and that no power over the freedom of religion, freedom of speech, or freedom of the press, being delegated to the United States by the Constitution, nor prohibited by it to the states, all lawful powers respecting the same did of right remain, and were reserved to the states, or to the people; that thus was manifested their determination to retain to themselves the right of judging how far the licentiousness of speech and of the press may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use, should be tolerated rather than the use be destroyed; and thus also they guarded against all abridgment by the United States of the freedom of religious opinions and exercises, and retained to themselves the right of protecting the same, as this state by a law passed on the general demand of its citizens, had already protected them from all human restraint or interference: and that in addition to this general principle and express declaration, another and more special provision has been made by one of the amendments to the Constitution, which expressly declares, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press," thereby guarding in the same sentence, and under the same words, the freedom of religion, of speech, and of the press, insomuch, that whatever violates either, throws down the sanctuary which covers the others, and that libels, falsehoods, and defamations, equally with heresy and false religion, are withheld from the cognizance of federal tribunals: that therefore the act of the Congress of the United States, passed on the 14th day of July, 1798, entitled, "an act in addition to the act for the punishment of certain crimes against the United States," which does abridge the freedom of the press, is not law, but is altogether void and of no effect.

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4. *Resolved*, That alien-friends are under the jurisdiction and protection of the laws of the state wherein they are; that no power over them has been delegated to the United States, nor prohibited to the individual states distinct from their power over citizens; and it being true as a general principle, and one of the amendments to the Constitution having also declared, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people," the act of the Congress of the United States, passed on the 22d day of June, 1798, entitled "an act concerning aliens," which assumes power over alien-friends not delegated by the Constitution, is not law, but is altogether void and of no force.

5. *Resolved*, That in addition to the general principle as well as the express declaration, that powers not delegated are reserved, another and more special provision inserted in the Constitution, from abundant caution, has declared, "that the *migration* or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808": that this commonwealth does admit the migration of alien-friends described as the subject of the said act concerning aliens; that a provision against prohibiting their migration, is a provision against all acts equivalent thereto, or it would be nugatory; that to remove them when migrated, is equivalent to a prohibition of their migration, and is therefore contrary to the said provision of the Constitution, and void.

6. *Resolved*, That the imprisonment of a person under the protection of the laws of this commonwealth, on his failure to obey the simple *order* of the President, to depart out of the United States, as is undertaken by the said act, entitled "an act concerning aliens," is contrary to the Constitution, one amendment to which has provided, that "no person shall be deprived of liberty without the due process of law," and that another having provided, "that in all criminal prosecutions, the accused shall enjoy the right to a public trial by an impartial jury, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense," the same act undertaking to authorize the President to remove a person out of the United States, who is under the protection of the law, on his own suspicion, without accusation, without jury, without public trial, without confrontation of the witnesses against him, without having witnesses in his favor, without defense, without counsel, is contrary to these provisions, also, of the Constitution, is therefore not law, but utterly void and of no force.

That transferring the power of judging any person who is under the protection of the laws, from the courts to the President of the United States, as is undertaken by the same act, concerning aliens, is against the article of the Constitution which provides, that "the judicial power of the United States shall be vested in courts, the

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judges of which shall hold their offices during good behavior," and that the said act is void for that reason also; and it is further to be noted, that this transfer of judiciary power is to that magistrate of the General Government, who already possesses all the executive, and a qualified negative in all the legislative powers.

7. *Resolved*, That the construction applied by the General Government, (as is evinced by sundry of their proceedings,) to those parts of the Constitution of the United States which delegates to Congress a power to lay and collect taxes, duties, imposts, and excises; to pay the debts, and provide for the common defense and general welfare of the United States, and to make all laws which shall be necessary and proper for carrying into execution the powers vested by the Constitution in the Government of the United States, or any department thereof, goes to the destruction of all the limits prescribed to their power by the Constitution: that words meant by that instrument to be subsidiary only to the execution of the limited powers, ought not to be so construed as themselves to give unlimited powers, nor a part so to be taken, as to destroy the whole residue of the instrument: that the proceedings of the General Government under color of these articles, will be a fit and necessary subject for revisal and correction at a time of greater tranquillity, while those specified in the preceding resolutions call for immediate redress.

8. *Resolved*, That the preceding resolutions be transmitted to the senators and representatives in Congress from this commonwealth, who are hereby enjoined to present the same to their respective houses, and to use their best endeavors to procure, at the next session of Congress, a repeal of the aforesaid unconstitutional and obnoxious acts.

9. *Resolved, lastly*, That the Governor of this commonwealth be, and is hereby authorized and requested to communicate the preceding resolutions to the legislatures of the several states, to assure them that this commonwealth considers union for specified national purposes, and particularly for those specified in their late federal compact, to be friendly to the peace, happiness and prosperity of all the states: that, faithful to that compact, according to the plain intent and meaning in which it was understood and acceded to by the several parties, it is sincerely anxious for its preservation: that it does also believe, that to take from the states all the powers of self-government, and transfer them to a general and consolidated government, without regard to the special obligations and reservations solemnly agreed to in that compact, is not for the peace, happiness or prosperity of these states: and that therefore, this commonwealth is determined, as it doubts not its co-states are, tamely to submit to undelegated and consequently unlimited powers in no man or body of men on earth: that if the acts before specified should stand, these conclusions would flow from them; that the general government may place any act they think proper on the list of crimes, and punish it themselves, whether enumerated or not enumerated by the Constitution, as cognizable by them; that they may transfer its cognizance to the

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President or any other person, who may himself be the accuser, counsel, judge and jury, whose *suspicions* may be the evidence, his order the sentence, his officer the executioner, and his breast the sole record of the transaction; that a very numerous and valuable description of the inhabitants of these states being, by this precedent, reduced as outlaws to the absolute dominion of one man, and the barrier of the Constitution thus swept away from us all, no rampart now remains against the passions and the power of a majority of Congress, to protect from a like exportation or other more grievous punishment the minority of the same body, the legislatures, judges, governors, and counselors of the states, nor their other peaceable inhabitants who may venture to reclaim the constitutional rights and liberties of the states and people, or who, for other causes, good or bad, may be obnoxious to the views, or marked by the suspicions of the President, or be thought dangerous to his or their elections, or other interests public or personal: that the friendless alien has indeed been selected as the safest subject of a first experiment; but the citizen will soon follow, or rather has already followed; for, already has a sedition-act marked him as its prey: that these and successive acts of the same character, unless arrested on the threshold, may tend to drive these states into revolution and blood, and will furnish new calumnies against republican governments, and new pretexts for those who wish it to be believed, that man cannot be governed but by a rod of iron: that it would be a dangerous delusion, were a confidence in the men of our choice, to silence our fears for the safety of our rights: that confidence is everywhere the parent of despotism; free government is founded in jealousy, and not in confidence; it is jealousy and not confidence which prescribes limited constitutions to bind down those whom we are obliged to trust with power: that our Constitution has accordingly fixed the limits to which and no further our confidence may go; and let the honest advocate of confidence read the alien and sedition acts, and say if the Constitution has not been wise in fixing limits to the government it created, and whether we should be wise in destroying those limits? Let him say what the government is if it be not a tyranny, which the men of our choice have conferred on the President, and the President of our choice has assented to and accepted, over the friendly strangers, to whom the mild spirit of our country and its laws had pledged hospitality and protection: that the men of our choice have more respected the bare suspicions of the President, than the solid rights of innocence, the claims of justification, the sacred force of truth, and the forms and substance of law and justice. In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief, by the chains of the Constitution. That this commonwealth does, therefore, call on its co-states for an expression of their sentiments on the acts concerning aliens, and for the punishment of certain crimes hereinbefore specified, plainly declaring whether these acts are or are not authorized by the Federal compact. And it doubts not that their sense will be so

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announced, as to prove their attachment unaltered to limited government, whether general or particular, and that the rights and liberties of their co-states, will be exposed to no dangers by remaining embarked on a common bottom with their own: That they will concur with this commonwealth in considering the said acts as so palpably against the Constitution, as to amount to an undisguised declaration, that the compact is not meant to be the measure of the powers of the general government, but that it will proceed in the exercise over these states of all powers whatsoever: That they will view this as seizing the rights of the states, and consolidating them in the hands of the general government with a power assumed to bind the states, (not merely in cases made federal,) but in all cases whatsoever, by laws made, not with their consent, but by others against their consent: That this would be to surrender the form of government we have chosen, and to live under one deriving its powers from its own will, and not from our authority; and that the co-states, recurring to their natural right in cases not made federal, will concur in declaring these acts void and of no force, and will each unite with this commonwealth, in requesting their repeal at the next session of Congress.

VIRGINIA RESOLUTIONS OF 1798.[1]

1. *Resolved*, that the General Assembly of Virginia doth unequivocally express a firm resolution to maintain and defend the Constitution of the United States, and the Constitution of this State, against every aggression, either foreign or domestic, and that it will support the government of the United States in all measures warranted by the former.

2. That this Assembly most solemnly declares a warm attachment to the union of the States, to maintain which, it pledges all its powers; and that for this end it is its duty to watch over and oppose every infraction of those principles, which constitute the only basis of that union, because a faithful observance of them can alone secure its existence, and the public happiness.

3. That this Assembly doth explicitly and peremptorily declare that it views the powers of the Federal Government as resulting from the compact, to which the States are parties, as limited by the plain sense and intention of the instrument constituting that compact; as no further valid than they are authorized by the grants enumerated in that compact; and that in case of a deliberate, palpable, and dangerous exercise of other powers not granted by the said compact, the States, who are the parties thereto, have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights, and liberties appertaining to them.

4. That the General Assembly doth also express its deep regret that a spirit has in sundry instances been manifested by the Federal

[1] Written by James Madison.

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Government, to enlarge its powers by forced constructions of the constitutional charter which defines them; and that indications have appeared of a design to expound certain general phrases (which, having been copied from the very limited grant of powers in the former articles of confederation, were the less liable to be misconstrued), so as to destroy the meaning and effect of the particular enumeration, which necessarily explains and limits the general phrases, and so as to consolidate the States by degrees into one sovereignty, the obvious tendency and inevitable result of which would be to transform the present republican system of the United States into an absolute, or at best, a mixed monarchy.

5. That the General Assembly doth particularly protest against the palpable and alarming infractions of the Constitution, in the two late cases of the "alien and sedition acts," passed at the last session of Congress, the first of which exercises a power nowhere delegated to the Federal Government; and which by uniting legislative and judicial powers to those of executive, subverts the general principles of free government, as well as the particular organization and positive provisions of the Federal Constitution; and the other of which acts exercises in like manner a power not delegated by the Constitution, but on the contrary expressly and positively forbidden by one of the amendments thereto; a power which more than any other ought to produce universal alarm, because it is leveled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.

6. That this State having by its convention which ratified the federal Constitution, expressly declared, "that among other essential rights, the liberty of conscience and of the press cannot be canceled, abridged, restrained, or modified by any authority of the United States," and from its extreme anxiety to guard these rights from every possible attack of sophistry or ambition, having with other States recommended an amendment for that purpose, which amendment was in due time annexed to the Constitution, it would mark a reproachful inconsistency and criminal degeneracy, if an indifference were now shown to the most palpable violation of one of the rights thus declared and secured, and to the establishment of a precedent which may be fatal to the other.

7. That the good people of this commonwealth having ever felt, and continuing to feel the most sincere affection to their brethren of the other States, the truest anxiety for establishing and perpetuating the union of all, and the most scrupulous fidelity to that Constitution which is the pledge of mutual friendship, and the instrument of mutual happiness, the General Assembly doth solemnly appeal to the like dispositions of the other States, in confidence that they will concur with this commonwealth in declaring, as it does hereby declare, that the acts aforesaid are unconstitutional, and that the necessary and proper measure will be taken by each, for co-operating with this State in maintaining unimpaired the authorities, rights, and liberties reserved to the States respectively, or to the people.

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8. That the Governor be desired to transmit a copy of the foregoing resolutions to the executive authority of each of the other States, with a request that the same may be communicated to the legislature thereof. And that a copy be furnished to each of the senators and representatives representing this State in the Congress of the United States.

JEFFERSON'S DRAFT ON AN AMENDMENT TO THE CONSTITUTION, 1803.

The province of Louisiana is incorporated with the U. S. and made part thereof. The rights of occupancy in the soil, and of self-government, are confirmed to the Indian inhabitants, as they now exist. Pre-emption only of the portions rightfully occupied by them, and a succession to the occupancy of such as they may abandon, with the full rights of possession as well as of property and sovereignty in whatever is not or shall cease to be so rightfully occupied by them shall belong to the U. S.

The legislature of the Union shall have authority to exchange the right of occupancy in portions where the U. S. have full right for lands possessed by Indians within the U. S. on the East side of the Missisipi; to exchange lands on the East side of the river for those on the West side thereof and above the latitude of 31 degrees; to maintain in any part of the province such military posts as may be requisite for peace or safety; to exercise police over all persons therein, not being Indian inhabitants; to work salt springs, or mines of coal, metals and other minerals within the possession of the U. S. or in any others with the consent of the possessors; to regulate trade and intercourse between the Indian inhabitants and all other persons; to explore and ascertain the geography of the province, its productions and other interesting circumstances; to open roads and navigation therein where necessary for beneficial communication; and to establish agencies and factories therein for the cultivation of commerce, peace and good understanding with the Indians residing there.

The legislature shall have no authority to dispose of the lands of the province otherwise than is hereinbefore permitted, until a new Amendment of the constitution shall give that authority. Except as to that portion thereof which lies south of the latitude of 31 degrees; which whenever they deem expedient, they may erect into a territorial Government, either separate or as making part with one on the eastern side of the river, vesting the inhabitants thereof with all the rights possessed by other territorial citizens of the U. S.

ABSTRACT OF DECISION IN THE CASE OF MARBURY VS. MADISON, 1803.[1]

The question whether an act repugnant to the constitution can become a law of the land, is a question deeply interesting to the

[1] In full in 1 Cranch 137.

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United States; but happily not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles supposed to have been long and well established, to decide it. . . . That the people have an original right to establish for their future government such principles as in their opinion shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The original supreme will organizes the government and assigns to the different departments their respective powers. . . . The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited and to what purpose is that limitation committed to writing, if those limits may at any time be passed by those intended to be restrained? . . . . The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like any other act is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law. If the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable. . . . If an act of the legislature repugnant to the constitution is void, does it, notwithstanding its validity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as though it was a law? This would be to overthrow in fact what was established in theory; and would seem at first view an absurdity too gross to be insisted upon. It shall, however, receive a more attentive consideration. It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide upon the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law—the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is Superior to any ordinary act of the legislature, the Constitution and not such ordinary act, must govern the case to which they both apply. Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution and see only the law.

AMENDMENTS TO THE CONSTITUTION PROPOSED BY THE HARTFORD CONVENTION, 1814.

Therefore resolved.—That it be and hereby is recommended to the Legislatures of the several States represented in this Conven-

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tion, to adopt all such measures as may be necessary effectually to protect the citizens of said States from the operation and effects of all acts which have been or may be passed by the Congress of the United States, which shall contain provisions, subjecting the militia or other citizens to forcible drafts, conscriptions, or impressments, not authorized by the Constitution of the United States.

Resolved.—That it be and hereby is recommended to the said Legislatures, to authorize an immediate and earnest application to be made to the Government of the United States, requesting their consent to some arrangement, whereby the said States may, separately or in concert, be empowered to assume upon themselves the defense of their territory against the enemy; and a reasonable portion of the taxes, collected within said States, may be paid into the respective treasuries thereof, and appropriated to the payment of the balance due said States, and to the future defense of the same. The amount so paid into the said treasuries to be credited, and the disbursements made as aforesaid to be charged to the United States.

Resolved.—That it be, and it hereby is, recommended to the Legislatures of the aforesaid States, to pass laws (where it has not already been done) authorizing the Governors or Commanders-in Chief of their militia to make detachments from the same, or to form voluntary corps, as shall be most convenient and conformable to their Constitutions, and to cause the same to be well armed, equipped and disciplined, and held in readiness for service; and upon the request of the Governor of either of the other States, to employ the whole of such detachment or corps, as well as the regular forces of the State, or such part thereof as may be required and can be spared consistently with the safety of the State, in assisting the State, making such request to repel any invasion thereof which shall be made or attempted by the public enemy.

Resolved.—That the following amendments of the Constitution of the United States, be recommended to the States as aforesaid, to be proposed by them for adoption by the State Legislatures, and, in such cases as may be deemed expedient, by a Convention chosen by the people of each State.

And it is further recommended, that the said States shall persevere in their efforts to obtain such amendments, until the same shall be effected.

First.—Representatives and direct taxes shall be apportioned among the several States which may be included within this union, according to their respective numbers of free persons, including those bound to serve for a term of years, and excluding Indians not taxed, and all other persons.

Second.—No new State shall be admitted into the union by Congress in virtue of the power granted by the Constitution, without the concurrence of two-thirds of both Houses.

Third.—Congress shall not have power to lay any embargo on the ships or vessels of the citizens of the United States, in the ports or harbors thereof, for more than sixty days.

Fourth.—Congress shall not have power, without the concur-

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rence of two-thirds of both Houses, to interdict the commercial intercourse between the United States and any foreign nation or the dependencies thereof.

Fifth.—Congress shall not make or declare war, or authorize acts of hostility against any foreign nation, without the concurrence of two-thirds of both Houses, except such acts of hostility be in defense of the territories of the United States when actually invaded.

Sixth.—No person who shall hereafter be naturalized, shall be eligible as a member of the Senate or House of Representatives of the United States, nor capable of holding any civil office under the authority of the United States.

Seventh.—The same person shall not be elected President of the United States a second time; nor shall the President be elected from the same State two terms in succession.

Resolved.—That if the application of these States to the government of the United States, recommended in a foregoing Resolution, should be unsuccessful, and peace should not be concluded, and the defense of these States should be neglected, as it has been since the commencement of the war, it will in the opinion of this Convention be expedient for the Legislatures of the several States to appoint Delegates to another Convention, to meet at Boston, in the State of Massachusetts, on the third Thursday of June next, with such powers and instructions as the exigency of a crisis so momentous may require.

THE MISSOURI COMPROMISE, 1820.

An act to authorize the people of the Missouri territory to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states, and to prohibit slavery in certain territories.

SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of that portion of the Missouri territory included within the boundaries hereinafter designated, be, and they are hereby authorized to form for themselves a constitution and state government; and to assume such name as they shall deem proper; and the said state when formed, shall be admitted into the Union upon an equal footing with the original states, in all respects whatsoever. . . .

SEC. 8. And be it further enacted, That in all that territory ceded by France to the United States, under the name of Louisiana, which lies north of thirty-six degrees and thirty minutes north latitude, not included within the limits of the state contemplated by this act, slavery and involuntary servitude, otherwise than in the punishment of crimes whereof the parties shall have been duly convicted, shall be, and is hereby forever prohibited; Provided always, That any person escaping into the same, from whom labor or service is lawfully claimed, in any state or territory of the United

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States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.

Approved 6th March, 1820.

SOUTH CAROLINA ORDINANCE OF NULLIFICATION, 1832.

An ordinance to nullify certain acts of the Congress of the United States, purporting to be laws laying duties and imposts on the importation of foreign commodities.

Whereas the Congress of the United States by various acts, purporting to be acts laying duties and imposts on foreign imports, but in reality intended for the protection of domestic manufactures, and the giving of bounties to classes and individuals engaged in particular employments, at the expense and to the injury and oppression of other classes and individuals, and by wholly exempting from taxation certain foreign commodities, such as are not produced or manufactured in the United States, to afford a pretext for imposing higher and excessive duties on articles similar to those intended to be protected, hath exceeded its just powers under the constitution, which confers on it no authority to afford such protection, and hath violated the true meaning and intent of the constitution, which provides for equality in imposing the burdens of taxation upon the several States and portions of the confederacy: And whereas the said Congress, exceeding its just power to impose taxes and collect revenue for the purpose of effecting and accomplishing the specific objects and purposes which the constitution of the United States authorizes it to effect and accomplish, hath raised and collected unnecessary revenue for objects unauthorized by the constitution.

We, therefore, the people of the State of South Carolina, in convention assembled, do declare and ordain and it is hereby declared and ordained, that the several acts and parts of acts of the Congress of the United States, purporting to be laws for the imposing of duties and imposts on the importation of foreign commodities, and now having actual operation and effect within the United States, and, more especially, an act entitled "An act in alteration of the several acts imposing duties on imports," approved on the nineteenth day of May, one thousand eight hundred and twenty-eight, and also an act entitled "An act to alter and amend the several acts imposing duties on imports," approved on the fourteenth day of July, one thousand eight hundred and thirty-two, are unauthorized by the constitution of the United States, and violate the true meaning and intent thereof and are null, void, and no law, nor binding upon this State, its officers or citizens; and all promises, contracts, and obligations, made or entered into, or to be made or entered into, with purpose to secure the duties imposed by said acts, and all judicial proceedings which shall be hereafter had in affirmance thereof, are and shall be held utterly null and void.

And it is further ordained, that it shall not be lawful for any of the constituted authorities, whether of this State or of the United States, to enforce the payment of duties imposed by the said acts

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within the limits of this State; but it shall be the duty of the legislature to adopt such measures and pass such acts as may be necessary to give full effect to this ordinance, and to prevent the enforcement and arrest the operation of the said acts and parts of acts of the Congress of the United States within the limits of this State, from and after the first day of February next, and the duties of all other constituted authorities, and of all persons residing or being within the limits of this State, and they are hereby required and enjoined to obey and give effect to this ordinance, and such acts and measures of the legislature as may be passed or adopted in obedience thereto.

And it is further ordained, that in no case of law or equity, decided in the courts of this State, wherein shall be drawn in question the authority of this ordinance, or the validity of such act or acts of the legislature as may be passed for the purpose of giving effect thereto, or the validity of the aforesaid acts of Congress, imposing duties, shall any appeal be taken or allowed to the Supreme Court of the United States, nor shall any copy of the record be permitted or allowed for that purpose; and if any such appeal shall be attempted to be taken, the courts of this State shall proceed to execute and enforce their judgments according to the laws and usages of the State, without reference to such attempted appeal, and the person or persons attempting to take such appeal may be dealt with as for a contempt of the court.

And it is further ordained, that all persons now holding any office of honor, profit, or trust, civil or military, under this State (members of the legislature excepted), shall, within such time, and in such manner as the legislature shall prescribe, take an oath well and truly to obey, execute, and enforce this ordinance, and such act or acts of the legislature as may be passed in pursuance thereof, according to the true intent and meaning of the same; and on the neglect or omission of any such person or persons so to do, his or their office or offices shall be forthwith vacated, and shall be filled up as if such person or persons were dead or had resigned; and no person hereafter elected to any office of honor, profit, or trust, civil or military (members of the legislature excepted), shall, until the legislature shall otherwise provide and direct, enter on the execution of his office, or be in any respect competent to discharge the duties thereof until he shall, in like manner, have taken a similar oath; and no juror shall be impaneled in any of the courts of this State, in any cause in which shall be in question this ordinance, or any act of the legislature passed in pursuance thereof, unless he shall first, in addition to the usual oath, have taken an oath that he will well and truly obey, execute, and enforce this ordinance, and such act or acts of the legislature as may be passed to carry the same into operation and effect, according to the true intent and meaning thereof.

And we, the people of South Carolina, to the end that it may be fully understood by the government of the United States, and the people of the co-States, that we are determined to maintain this our ordinance and declaration, at every hazard, do further declare

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that we will not submit to the application of force on the part of the federal government, to reduce this State to obedience; but that we will consider the passage, by Congress, of any act authorizing the employment of a military or naval force against the State of South Carolina, her constitutional authorities or citizens; or any act abolishing or closing the ports of this State, or any of them, or otherwise obstructing the free ingress and egress of vessels to and from the said ports, or any other act on the part of the federal government, to coerce the State, shut up her ports, destroy or harass her commerce or to enforce the acts hereby declared to be null and void, otherwise than through the civil tribunals of the country, as inconsistent with the longer continuance of South Carolina in the Union; and that the people of this State will henceforth hold themselves absolved from all further obligation to maintain or preserve their political connection with the people of the other States; and will forthwith proceed to organize a separate government, and do all other acts and things which sovereign and independent States may of right do.

Done in convention at Columbia, the twenty-fourth day of November, in the year of our Lord one thousand eight hundred and thirty-two, and in the fifty-seventh year of the Declaration of the Independence of the United States of America.

PRESIDENT JACKSON'S PROCLAMATION, 1832.[1]

Whereas a convention, assembled in the State of South Carolina, have passed an ordinance, by which they declare "that the several acts and parts of acts of the Congress of the United States, purporting to be laws for the imposing of duties and imposts on the importation of foreign commodities, and now having actual operation and effect within the United States, and more especially 'two acts for the same purposes, passed on the 29th of May, 1828, and on the 14th of July, 1832,' are unauthorized by the Constitution of the United States, and violate the true meaning and intent thereof, and are null and void, and no law," nor binding on the citizens of that State or its officers; and by the said ordinance it is further declared to be unlawful for any of the constituted authorities of the State, or of the United States, to enforce the payment of the duties imposed by the said acts within the same State, and that it is the duty of the legislature to pass such laws as may be necessary to give full effect to the said ordinances:

And whereas, by the said ordinance it is further ordained, that, in no case of law or equity, decided in the courts of said State, wherein shall be drawn in question the validity of the said ordinance, or of the acts of the legislature that may be passed to give it effect, or of the said laws of the United States, no appeal shall be allowed to the Supreme Court of the United States, nor shall any

[1] Written by Edward Livingston.

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copy of the record be permitted or allowed for that purpose; and that any person attempting to take such appeal, shall be punished as for a contempt of court:

And, finally, the said ordinance declares that the people of South Carolina will maintain the said ordinance at every hazard; and that they will consider the passage of any act by Congress abolishing or closing the ports of the said State, or otherwise obstructing the free ingress or egress of vessels to and from the said ports, or any other act of the Federal Government to coerce the State, shut up her ports, destroy or harass her commerce, or to enforce the said acts otherwise than through the civil tribunals of the country, as inconsistent with the longer continuance of South Carolina in the Union; and that the people of the said State will thenceforth hold themselves absolved from all further obligation to maintain or preserve their political connection with the people of the other States, and will forthwith proceed to organize a separate government, and do all other acts and things which sovereign and independent States may of right do:

And whereas the said ordinance prescribes to the people of South Carolina a course of conduct in direct violation of their duty as citizens of the United States, contrary to the laws of their country, subversive of its Constitution, and having for its object the destruction of the Union—that Union, which, coeval with our political existence, led our fathers, without any other ties to unite them than those of patriotism and common cause, through the sanguinary struggle to a glorious independence—that sacred Union, hitherto inviolate, which, perfected by our happy Constitution, has brought us, by the favor of Heaven, to a state of prosperity at home, and high consideration abroad, rarely, if ever, equaled in the history of nations; to preserve this bond of our political existence from destruction, to maintain inviolate this state of national honor and prosperity, and to justify the confidence my fellow-citizens have reposed in me, I, Andrew Jackson, President of the United States, have thought proper to issue this my PROCLAMATION, stating my views of the Constitution and laws applicable to the measures adopted by the Convention of South Carolina, and to the reasons they have put forth to sustain them, declaring the course which duty will require me to pursue, and, appealing to the understanding and patriotism of the people, warn them of the consequences that must inevitably result from an observance of the dictates of the Convention.

Strict duty would require of me nothing more than the exercise of those powers with which I am now, or may hereafter be, invested, for preserving the Union, and for the execution of the laws. But the imposing aspect which opposition has assumed in this case, by clothing itself with State authority, and the deep interest which the people of the United States must all feel in preventing a resort to stronger measures, while there is a hope that anything will be yielded to reasoning and remonstrances, perhaps demand, and will certainly justify, a full exposition to South Carolina and the nation of the views I entertain of this important question, as

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well as a distinct enunciation of the course which my sense of duty will require me to pursue.

The ordinance is founded, not on the indefeasible right of resisting acts which are plainly unconstitutional, and too oppressive to be endured, but on the strange position that any one State may not only declare an act of Congress void, but prohibit its execution—that they may do this consistently with the Constitution—that the true construction of that instrument permits a State to retain its place in the Union, and yet be bound by no other of its laws than those it may choose to consider as constitutional. It is true they add, that to justify this abrogation of a law, it must be palpably contrary to the Constitution; but it is evident, that to give the right of resisting laws of that description, coupled with the uncontrolled right to decide what laws deserve that character, is to give the power of resisting all laws. For, as by the theory, there is no appeal, the reasons alleged by the State, good or bad, must prevail. If it should be said that public opinion is a sufficient check against the abuse of this power, it may be asked why it is not deemed a sufficient guard against the passage of an unconstitutional act by Congress. There is, however, a restraint in this last case, which makes the assumed power of a State more indefensible, and which does not exist in the other. There are two appeals from an unconstitutional act passed by Congress—one to the judiciary, the other to the people and the States. There is no appeal from the State decision in theory; and the practical illustration shows that the courts are closed against an application to review it, both judges and jurors being sworn to decide in its favor. But reasoning on this subject is superfluous, when our social compact in express terms declares, that the laws of the United States, its Constitution, and treaties made under it, are the supreme law of the land; and for greater caution adds, "that the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." And it may be asserted, without fear of refutation, that no federative government could exist without a similar provision. Look, for a moment, to the consequence. If South Carolina considers the revenue laws unconstitutional, and has a right to prevent their execution in the port of Charleston, there would be a clear constitutional objection to their collection in every other port, and no revenue could be collected anywhere; for all imposts must be equal. It is no answer to repeat that an unconstitutional law is no law, so long as the question of its legality is to be decided by the State itself; for every law operating injuriously upon any local interest will be perhaps thought, and certainly represented, as unconstitutional, and, as has been shown, there is no appeal.

If this doctrine had been established at an earlier day, the Union would have been dissolved in its infancy. The excise law in Pennsylvania, the embargo and non-intercourse law in the Eastern States, the carriage tax in Virginia, were all deemed unconstitutional, and were more unequal in their operation than any of the laws now complained of; but, fortunately, none of those States

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discovered that they had the right now claimed by South Carolina. The war into which we were forced, to support the dignity of the nation and the rights of our citizens, might have ended in defeat and disgrace, instead of victory and honor, if the States, who supposed it a ruinous and unconstitutional measure, had thought they possessed the right of nullifying the act by which it was declared, and denying supplies for its prosecution. Hardly and unequally as those measures bore upon several members of the Union, to the legislatures of none did this efficient and peaceable remedy, as it is called, suggest itself. The discovery of this important feature in our Constitution was reserved to the present day. To the statesmen of South Carolina belongs the invention, and upon the citizens of that State will, unfortunately, fall the evils of reducing it to practice.

If the doctrine of a State veto upon the laws of the Union carries with it internal evidence of its impracticable absurdity, our constitutional history will also afford abundant proof that it would have been repudiated with indignation had it been proposed to form a feature in our Government.

In our colonial state, although dependent on another power, we very early considered ourselves as connected by common interest with each other. Leagues were formed for common defense, and before the Declaration of Independence, we were known in our aggregate character as the United Colonies of America. That decisive and important step was taken jointly. We declared ourselves a nation by a joint, not by several acts; and when the terms of our confederation were reduced to form, it was in that of a solemn league of several States, by which they agreed that they would, collectively, form one nation, for the purpose of conducting some certain domestic concerns, and all foreign relations. In the instrument forming that Union, is found an article which declares that "every State shall abide by the determinations of Congress on all questions which by that Confederation should be submitted to them."

Under the Confederation, then, no State could legally annul a decision of the Congress, or refuse to submit to its execution; but no provision was made to enforce these decisions. Congress made requisitions, but they were not complied with. The Government could not operate on individuals. They had no judiciary, no means of collecting revenue.

But the defects of the Confederation need not be detailed. Under its operation we could scarcely be called a nation. We had neither prosperity at home nor consideration abroad. This state of things could not be endured, and our present happy Constitution was formed, but formed in vain, if this fatal doctrine prevails. It was formed for important objects that are announced in the preamble made in the name and by the authority of the people of the United States, whose delegates framed, and whose conventions approved it.

The most important among these objects, that which is placed first in rank, on which all the others rest, is "*to form a more*

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perfect Union." Now, is it possible that, even if there were no express provision giving supremacy to the Constitution and laws of the United States over those of the States, it can be conceived that an instrument made for the purpose of "*forming a more perfect Union*" than that of the confederation, could be so constructed by the assembled wisdom of our country as to substitute for that confederation a form of government, dependent for its existence on the local interest, the party spirit of a State, or of a prevailing faction in a State? Every man, of plain, unsophisticated understanding, who hears the question, will give such an answer as will preserve the Union. Metaphysical subtlety, in pursuit of an impracticable theory, could alone have devised one that is calculated to destroy it.

I consider, then, the power to annul a law of the United States, assumed by one State, *incompatible with the existence of the Union, contradicted expressly by the letter of the Constitution, unauthorized by its spirit, inconsistent with every principle on which it was founded, and destructive of the great object for which it was formed.*

After this general view of the leading principle, we must examine the particular application of it which is made in the ordinance.

The preamble rests its justification on these grounds: It assumes as a fact, that the obnoxious laws, although they purport to be laws for raising revenue, were in reality intended for the protection of manufactures, which purpose it asserts to be unconstitutional; that the operation of these laws is unequal; that the amount raised by them is greater than is required by the wants of the Government; and, finally, that the proceeds are to be applied to objects unauthorized by the Constitution. These are the only causes alleged to justify an open opposition to the laws of the country, and a threat of seceding from the Union, if any attempt should be made to enforce them. The first virtually acknowledges that the law in question was passed under a power expressly given by the Constitution, to lay and collect imposts; but its constitutionality is drawn in question from the motives of those who passed it. However apparent this purpose may be in the present case, nothing can be more dangerous than to admit the position that an unconstitutional purpose, entertained by the members who assent to a law enacted under a constitutional power, shall make that law void; for how is that purpose to be ascertained? Who is to make the scrutiny? How often may bad purposes be falsely imputed? In how many cases are they concealed by false professions? In how many is no declaration of motive made? Admit this doctrine, and you give to the States an uncontrolled right to decide, and every law may be annulled under this pretext. If, therefore, the absurd and dangerous doctrine should be admitted, that a State may annul an unconstitutional law, or one that it deems such, it will not apply to the present case.

The next objection is, that the laws in question operate unequally. This objection may be made with truth to every law that has been or can be passed. The wisdom of man never yet con-

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trived a system of taxation that would operate with perfect equality. If the unequal operation of a law makes it unconstitutional, and if all laws of that description may be abrogated by any State for that cause, then, indeed, is the federal Constitution unworthy of the slightest effort for its preservation. We have hitherto relied on it as the perpetual bond of our Union. We have received it as the work of the assembled wisdom of the nation. We have trusted to it as to the sheet-anchor of our safety, in the stormy times of conflict with a foreign or domestic foe. We have looked to it with sacred awe as the palladium of our liberties, and with all the solemnities of religion have pledged to each other our lives and fortunes here, and our hopes of happiness hereafter, in its defense and support. Were we mistaken, my countrymen, in attaching this importance to the Constitution of our country? Was our devotion paid to the wretched, inefficient, clumsy contrivance, which this new doctrine would make it? Did we pledge ourselves to the support of an airy nothing—a bubble that must be blown away by the first breath of disaffection? Was this self-destroying, visionary theory the work of the profound statesmen, the exalted patriots, to whom the task of constitutional reform was intrusted? Did the name of Washington sanction, did the States deliberately ratify, such an anomaly in the history of fundamental legislation? No. We were not mistaken. The letter of this great instrument is free from this radical fault; its language directly contradicts the imputation; its spirit, its evident intent, contradicts it. No, we did not err. Our Constitution does not contain the absurdity of giving power to make laws, and another power to resist them. The sages, whose memory will always be reverenced, have given us a practical, and, as they hoped, a permanent constitutional compact. The Father of his Country did not affix his revered name to so palpable an absurdity. Nor did the States, when they severally ratified it, do so under the impression that a veto on the laws of the United States was reserved to them, or that they could exercise it by application. Search the debates in all their conventions—examine the speeches of the most zealous opposers of federal authority—look at the amendments that were proposed. They are all silent—not a syllable uttered, not a vote given, not a motion made, to correct the explicit supremacy given to the laws of the Union over those of the States, or to show that implication, as is now contended, could defeat it. No, we have not erred! The Constitution is still the object of our reverence, the bond of our Union, our defense in danger, the source of our prosperity in peace. It shall descend, as we have received it, uncorrupted by sophistical construction, to our posterity; and the sacrifices of local interest, of State prejudices, of personal animosities, that were made to bring it into existence, will again be patriotically offered for its support.

The two remaining objections made by the ordinance to these laws are, that the sums intended to be raised by them are greater than are required, and that the proceeds will be unconstitutionally employed. The Constitution has given expressly to Congress the right of raising revenue, and of determining the sum the public exi-

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gencies will require. The States have no control over the exercise of this right other than that which results from the power of changing the representatives who abuse it, and thus procure redress. Congress may undoubtedly abuse this discretionary power, but the same may be said of others with which they are vested. Yet the discretion must exist somewhere. The Constitution has given it to the representatives of all the people, checked by the representatives of the States, and by the executive power. The South Carolina construction gives it to the legislature, or the convention of a single State, where neither the people of the different States, nor the States in their separate capacity, nor the chief magistrate elected by the people, have any representation. Which is the most discreet disposition of the power? I do not ask you, fellow-citizens, which is the constitutional disposition—that instrument speaks a language not to be misunderstood. But if you were assembled in general convention, which would you think the safest depository of this discretionary power in the last resort? Would you add a clause giving it to each of the States, or would you sanction the wise provisions already made by your Constitution? If this should be the result of your deliberations when providing for the future, are you—can you—be ready to risk all that we hold dear, to establish, for a temporary and a local purpose, that which you must acknowledge to be destructive, and even absurd, as a general provision? Carry out the consequences of this right vested in the different States, and you must perceive that the crisis your conduct presents at this day would recur whenever any law of the United States displeased any of the States, and that we should soon cease to be a nation.

The ordinance, with the same knowledge of the future that characterizes a former objection, tells you that the proceeds of the tax will be unconstitutionally applied. If this could be ascertained with certainty, the objection would, with more propriety, be reserved for the law so applying the proceeds, but surely cannot be urged against the laws levying the duty.

These are the allegations contained in the ordinance. Examine them seriously, my fellow-citizens—judge for yourselves. I appeal to you to determine whether they are so clear, so convincing, as to leave no doubt of their correctness; and even if you should come to this conclusion, how far they justify the reckless, destructive course which you are directed to pursue. Review these objections, and the conclusions drawn from them once more. What are they? Every law, then, for raising revenue, according to the South Carolina ordinance, may be rightfully annulled, unless it be so framed as no law ever will or can be framed. Congress have a right to pass laws for raising revenue, and each State has a right to oppose their execution—two rights directly opposed to each other; and yet is this absurdity supposed to be contained in an instrument drawn for the express purpose of avoiding collisions between the States and the general government, by an assembly of the most enlightened statesmen and purest patriots ever embodied for a similar purpose.

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In vain have these sages declared that Congress shall have power to lay and collect taxes, duties, imposts, and excises—in vain have they provided that they shall have power to pass laws which shall be necessary and proper to carry those powers into execution, that those laws and that Constitution shall be the "supreme law of the land; and that the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." In vain have the people of the several States solemnly sanctioned these provisions, made them their paramount law, and individually sworn to support them whenever they were called on to execute any office.

Vain provisions! Ineffectual restrictions! Vile profanation of oaths! Miserable mockery of legislation! If a bare majority of the voters in any one State may, on a real or supposed knowledge of the intent with which a law has been passed, declare themselves free from its operation—say here it gives too little, there too much, and operates unequally—here it suffers articles to be free that ought to be taxed, there it taxes those that ought to be free—in this case the proceeds are intended to be applied to purposes which we do not approve, in that the amount raised is more than is wanted. Congress, it is true, are invested by the Constitution with the right of deciding these questions according to their sound discretion. Congress is composed of the representatives of all the States, and of all the people of all the states; but WE, part of the people of one State, to whom the Constitution has given no power on the subject, from whom it has expressly taken it away—*we*, who have solemnly agreed that this Constitution shall be our law—*we*, most of whom have sworn to support it—*we* now abrogate this law, and swear, and force others to swear, that it shall not be obeyed—and we do this, not because Congress have no right to pass such laws; this we do not allege; but because they have passed them with improper views. They are unconstitutional from the motives of those who passed them, which we can never with certainty know, from their unequal operation; although it is impossible from the nature of things that they should be equal—and from the disposition which we presume may be made of their proceeds, although that disposition has not been declared. This is the plain meaning of the ordinance in relation to laws which it abrogates for alleged unconstitutionality. But it does not stop here. It repeals, in express terms, an important part of the Constitution itself, and of laws passed to give it effect, which have never been alleged to be unconstitutional. The Constitution declares that the judicial powers of the United States extend to cases arising under the laws of the United States, and that such laws, the Constitution and treaties, shall be paramount to the State constitutions and laws. The judiciary act prescribes the mode by which the case may be brought before a court of the United States, by appeal, when a State tribunal shall decide against this provision of the Constitution. The ordinance declares there shall be no appeal; makes the State law paramount to the Constitution and laws of the United States; forces judges and jurors to swear that they will disregard their

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provisions; and even makes it penal in a suitor to attempt relief by appeal. It further declares that it shall not be lawful for the authorities of the United States, or of that State, to enforce the payment of duties imposed by the revenue laws within its limits.

Here is a law of the United States, not even pretended to be unconstitutional, repealed by the authority of a small majority of the voters of a single State. Here is a provision of the Constitution which is solemnly abrogated by the same authority.

On such expositions and reasonings, the ordinance grounds not only an assertion of the right to annul the laws of which it complains, but to enforce it by a threat of seceding from the Union if any attempt is made to execute them.

This right to secede is deduced from the nature of the Constitution, which they say is a compact between sovereign States, who have preserved their whole sovereignty, and therefore are subject to no superior; that because they made the compact, they can break it when in their opinion it has been departed from by the other States. Fallacious as this course of reasoning is, it enlists State pride, and finds advocates in the honest prejudices of those who have not studied the nature of our government sufficiently to see the radical error on which it rests.

The people of the United States formed the Constitution, acting through the State legislatures, in making the compact, to meet and discuss its provisions, and acting in separate conventions when they ratified those provisions; but the terms used in its construction show it to be a government in which the people of all the States collectively are represented. We are ONE PEOPLE in the choice of the President and Vice President. Here the States have no other agency than to direct the mode in which the vote shall be given. The candidates having the majority of all the votes are chosen. The electors of a majority of States may have given their votes for one candidate, and yet another may be chosen. The people, then, and not the States, are represented in the executive branch.

In the House of Representatives there is this difference, that the people of one State do not, as in the case of President and Vice President, all vote for all the members, each State electing only its own representatives. But this creates no material distinction. When chosen, they are all representatives of the United States, not representatives of the particular State from which they come. They are paid by the United States, not by the State; nor are they accountable to it for any act done in performance of their legislative functions; and however they may in practice, as it is their duty to do, consult and prefer the interests of their particular constituents when they come in conflict with any other partial or local interest, yet it is their first and highest duty, as representatives of the United States, to promote the general good.

The Constitution of the United States, then, forms a *government*, not a league, and whether it be formed by compact between the States, or in any other manner, its character is the same. It is a government in which all the people are represented, which

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operates directly on the people individually, not upon the States; they retained all the power they did not grant. But each State having expressly parted with so many powers as to constitute jointly with the other States a single nation, cannot from that period possess any right to secede, because such secession does not break a league, but destroys the unity of a nation, and any injury to that unity is not only a breach which would result from the contravention of a compact, but it is an offense against the whole Union. To say that any State may at pleasure secede from the Union, is to say that the United States are not a nation; because it would be a solecism to contend that any part of a nation might dissolve its connection with the other parts, to their injury or ruin, without committing any offense. Secession, like any other revolutionary act, may be morally justified by the extremity of oppression; but to call it a constitutional right, is confounding the meaning of terms, and can only be done through gross error, or to deceive those who are willing to assert a right, but would pause before they made a revolution, or incur the penalties consequent upon a failure.

Because the Union was formed by compact, it is said the parties to that compact may, when they feel themselves aggrieved, depart from it; but it is precisely because it is a compact that they cannot. A compact is an agreement or binding obligation. It may by its terms have a sanction or penalty for its breach, or it may not. If it contains no sanction, it may be broken with no other consequence than moral guilt; if it have a sanction, then the breach incurs the designated or implied penalty. A league between independent nations, generally, has no sanction other than a moral one; or if it should contain a penalty, as there is no common superior, it cannot be enforced. A government, on the contrary, always has a sanction, express or implied; and, in our case, it is both necessarily implied and expressly given. An attempt by force of arms to destroy a government is an offense, by whatever means the constitutional compact may have been formed; and such government has the right, by the law of self-defense, to pass acts for punishing the offender, unless that right is modified, restrained, or resumed by the constitutional act. In our system, although it is modified in the case of treason, yet authority is expressly given to pass all laws necessary to carry its powers into effect, and under this grant provision has been made for punishing acts which obstruct the due administration of the laws.

It would seem superfluous to add anything to show the nature of that union which connects us; but as erroneous opinions on this subject are the foundation of doctrines the most destructive to our peace, I must give some further development to my views on this subject. No one, fellow-citizens, has a higher reverence for the reserved rights of the States than the magistrate who now addresses you. No one would make greater personal sacrifices, or official exertions, to defend them from violation; but equal care must be taken to prevent, on their part, an improper interference with, or resumption of, the rights they have vested in the nation.

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The line has not been so distinctly drawn as to avoid doubts in some cases of the exercise of power. Men of the best intentions and soundest views may differ in their construction of some parts of the Constitution; but there are others on which dispassionate reflection can leave no doubt. Of this nature appears to be the assumed right of secession. It rests, as we have seen, on the alleged undivided sovereignty of the States, and on their having formed in this sovereign capacity a compact which is called the Constitution, from which, because they made it, they have the right to secede. Both of these positions are erroneous, and some of the arguments to prove them so have been anticipated.

The States severally have not retained their entire sovereignty. It has been shown that in becoming parts of a nation, not members of a league, they surrendered many of their essential parts of sovereignty. The right to make treaties, declare war, levy taxes, exercise exclusive judicial and legislative powers, were all functions of sovereign power. The States, then, for all these important purposes, were no longer sovereign. The allegiance of their citizens was transferred in the first instance to the government of the United States; they became American citizens, and owed obedience to the Constitution of the United States, and to laws made in conformity with the powers vested in Congress. This last position has not been, and cannot be, denied. How, then, can that State be said to be sovereign and independent whose citizens owe obedience to laws not made by it, and whose magistrates are sworn to disregard those laws, when they come in conflict with those passed by another? What shows conclusively that the States cannot be said to have reserved an undivided sovereignty, is that they expressly ceded the right to punish treason—not treason against their separate power, but treason against the United States. Treason is an offense against *sovereignty*, and sovereignty must reside with the power to punish it. But the reserved rights of the States are not less sacred because they have for their common interest made the general government the depository of these powers. The unity of our political character (as has been shown for another purpose) commenced with its very existence. Under the royal government we had no separate character; our opposition to its oppression began as UNITED COLONIES. We were the UNITED STATES under the Confederation, and the name was perpetuated and the Union rendered more perfect by the federal Constitution. In none of these stages did we consider ourselves in any other light than as forming one nation. Treaties and alliances were made in the name of all. Troops were raised for the joint defense. How, then, with all these proofs, that under all changes of our position we had, for designated purposes and with defined powers, created national governments—how is it that the most perfect of these several modes of union should now be considered as a mere league that may be dissolved at pleasure? It is from an abuse of terms. Compact is used as synonymous with league, although the true term is not employed, because it would at once show the fallacy of

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the reasoning. It would not do to say that our Constitution was only a league, but it is labored to prove it a compact (which, in one sense, it is), and then to argue that as a league is a compact, every compact between nations must, of course, be a league, and that from such an engagement every sovereign power has a right to recede. But it has been shown that in this sense the States are not sovereign, and that even if they were, and the national Constitution had been formed by compact, there would be no right in any one State to exonerate itself from the obligation.

So obvious are the reasons which forbid this secession, that it is necessary only to allude to them. The Union was formed for the benefit of all. It was produced by mutual sacrifice of interest and opinions. Can those sacrifices be recalled? Can the States, who magnanimously surrendered their title to the territories of the West, recall the grant? Will the inhabitants of the inland States agree to pay the duties that may be imposed without their assent by those on the Atlantic or the Gulf, for their own benefit? Shall there be a free port in one State, and enormous duties in another? No one believes that any right exists in a single State to involve all the others in these and countless other evils, contrary to engagements solemnly made. Everyone must see that the other States, in self-defense, must oppose it at all hazards.

These are the alternatives that are presented by the convention: A repeal of all the acts for raising revenue, leaving the government without the means of support; or an acquiescence in the dissolution of our Union by the secession of one of its members. When the first was proposed, it was known that it could not be listened to for a moment. It was known if force was applied to oppose the execution of the laws, that it must be repelled by force—that Congress could not, without involving itself in disgrace and the country in ruin, accede to the proposition; and yet if this is not done in a given day, or if any attempt is made to execute the laws, the State is, by the ordinance, declared to be out of the Union. The majority of a convention assembled for the purpose have dictated these terms, or rather this rejection of all terms, in the name of the people of South Carolina. It is true that the governor of the State speaks of the submission of their grievances to a convention of all the States; which, he says, they "sincerely and anxiously seek and desire." Yet this obvious and constitutional mode of obtaining the sense of the other States on the construction of the federal compact, and amending it, if necessary, has never been attempted by those who have urged the State on to this destructive measure. The State might have proposed a call for a general convention to the other States, and Congress, if a sufficient number of them concurred, must have called it. But the first magistrate of South Carolina, when he expressed a hope that, "on a review by Congress and the functionaries of the general government of the merits of the controversy," such a convention will be accorded to them, must have known that neither Congress, nor any functionary in the general government, has authority to call such a convention, unless it be demanded by two-thirds of the

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States. This suggestion, then, is another instance of the reckless inattention to the provisions of the Constitution with which this crisis has been madly hurried on; or of the attempt to persuade the people that a constitutional remedy has been sought and refused. If the legislature of South Carolina "anxiously desire" a general convention to consider their complaints, why have they not made application for it in the way the Constitution points out? The assertion that they "earnestly seek" is completely negatived by the omission.

This, then, is the position in which we stand. A small majority of the citizens of one State in the Union have elected delegates to a State convention; that convention has ordained that all the revenue laws of the United States must be repealed, or that they are no longer a member of the Union. The governor of that State has recommended to the legislature the raising of an army to carry the secession into effect, and that he may be empowered to give clearances to vessels in the name of the State. No act of violent opposition to the laws has yet been committed, but such a state of things is hourly apprehended, and it is the intent of this instrument to PROCLAIM, not only that the duty imposed on me by the Constitution, "to take care that the laws be faithfully executed," shall be performed to the extent of the powers already vested in me by law, or of such others as the wisdom of Congress shall devise and intrust to me for that purpose; but to warn the citizens of South Carolina, who have been deluded into an opposition to the laws, of the danger they will incur by obedience to the illegal and disorganizing ordinance of the convention—to exhort those who have refused to support it to persevere in their determination to uphold the Constitution and laws of their country, and to point out to all the perilous situation into which the good people of that State have been led, and that the course they are urged to pursue is one of ruin and disgrace to the very State whose rights they affect to support.

Fellow-citizens of my native State! let me not only admonish you, as the first magistrate of our common country, not to incur the penalty of its laws, but use the influence that a father would over his children whom he saw rushing to a certain ruin. In that paternal language, with that paternal feeling, let me tell you, my countrymen, that you are deluded by men who are either deceived themselves or wish to deceive you. Mark under what pretenses you have been led on to the brink of insurrection and treason on which you stand! First a diminution of the value of our staple commodity, lowered by over-production in other quarters and the consequent diminution in the value of your lands, were the sole effect of the tariff laws. The effect of those laws was confessedly injurious, but the evil was greatly exaggerated by the unfounded theory you were taught to believe, that its burdens were in proportion to your exports, not to your consumption of imported articles. Your pride was aroused by the assertions that a submission to these laws was a state of vassalage, and that resistance to them was equal, in patriotic merit, to the opposition our fathers

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offered to the oppressive laws of Great Britain. You were told that this opposition might be peaceably—might be constitutionally made—that you might enjoy all the advantages of the Union and bear none of its burdens. Eloquent appeals to your passions, to your State pride, to your native courage, to your sense of real injury, were used to prepare you for the period when the mask which concealed the hideous features of DISUNION should be taken off. It fell, and you were made to look with complacency on objects which not long since you would have regarded with horror. Look back to the arts which have brought you to this state—look forward to the consequences to which it must inevitably lead! Look back to what was first told you as an inducement to enter into this dangerous course. The great political truth was repeated to you that you had the revolutionary right of resisting all laws that were palpably unconstitutional and intolerably oppressive—it was added that the right to nullify a law rested on the same principle, but that it was a peaceable remedy! This character which was given to it, made you receive with too much confidence the assertions that were made of the unconstitutionality of the law and its oppressive effects. Mark, my fellow-citizens, that by the admission of your leaders the unconstitutionality must be *palpable*, or it will not justify either resistance or nullification! What is the meaning of the word *palpable* in the sense in which it is here used? that which is apparent to everyone, that which no man of ordinary intellect will fail to perceive. Is the unconstitutionality of these laws of that description? Let those among your leaders who once approved and advocated the principles of protective duties, answer the question; and let them choose whether they will be considered as incapable, then, of perceiving that which must have been apparent to every man of common understanding, or as imposing upon your confidence and endeavoring to mislead you now. In either case, they are unsafe guides in the perilous path they urge you to tread. Ponder well on this circumstance, and you will know how to appreciate the exaggerated language they address to you. They are not champions of liberty emulating the fame of our Revolutionary fathers, nor are you an oppressed people, contending, as they repeat to you, against worse than colonial vassalage. You are free members of a flourishing and happy Union. There is no settled design to oppress you. You have, indeed, felt the unequal operation of laws which may have been unwisely, not unconstitutionally passed; but that inequality must necessarily be removed. At the very moment when you were madly urged on to the unfortunate course you have begun, a change in public opinion has commenced. The nearly approaching payment of the public debt, and the consequent necessity of a diminution of duties, had already caused a considerable reduction, and that, too, on some articles of general consumption in your State. The importance of this change was underrated, and you were authoritatively told that no further alleviation of your burdens was to be expected, at the very time when the condition of the country imperiously demanded such a modification of the

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duties as should reduce them to a just and equitable scale. But, as apprehensive of the effect of this change in allaying your discontents, you were precipitated into the fearful state in which you now find yourselves.

I have urged you to look back to the means that were used to hurry you on to the position you have now assumed, and forward to the consequences they will produce. Something more is necessary. Contemplate the condition of that country of which you still form an important part; consider its government uniting in one bond of common interest and general protection so many different States—giving to all their inhabitants the proud title of AMERICAN CITIZEN—protecting their commerce—securing their literature and arts—facilitating their intercommunication—defending their frontiers—and making their name respected in the remotest parts of the earth! Consider the extent of its territory, its increasing and happy population, its advance in arts, which render life agreeable, and the sciences which elevate the mind! See education spreading the lights of religion, morality, and general information into every cottage in this wide extent of our Territories and States! Behold it as the asylum where the wretched and the oppressed find a refuge and support! Look on this picture of happiness and honor, and say, WE TOO, ARE CITIZENS OF AMERICA—Carolina is one of these proud States her arms have defended—her best blood has cemented this happy Union! And then add, if you can, without horror and remorse, this happy Union we will dissolve—this picture of peace and prosperity we will deface—this free intercourse we will interrupt—these fertile fields we will deluge with blood—the protection of that glorious flag we renounce—the very name of Americans we discard. And for what, mistaken men! For what do you throw away these inestimable blessings—for what would you exchange your share in the advantages and honor of the Union? For the dream of a separate independence—a dream interrupted by bloody conflicts with your neighbors, and a vile dependence on a foreign power. If your leaders could succeed in establishing a separation, what would be your situation? Are you united at home—are you free from the apprehension of civil discord, with all its fearful consequences? Do our neighboring republics, every day suffering some new revolution or contending with some new insurrection—do they excite your envy? But the dictates of a high duty oblige me solemnly to announce that you cannot succeed. The laws of the United States must be executed. I have no discretionary power on the subject—my duty is emphatically pronounced in the Constitution. Those who told you that you might peaceably prevent their execution, deceived you—they could not have been deceived themselves. They know that a forcible opposition could alone prevent the execution of the laws, and they know that such opposition must be repelled. Their object is disunion; but be not deceived by names; disunion, by armed force, is TREASON. Are you really ready to incur its guilt? If you are, on the head of the instigators of the act be the dreadful consequences—on their heads

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be the dishonor, but on yours may fall the punishment—on your unhappy State will inevitably fall all the evils of the conflict you force upon the government of your country. It cannot accede to the mad project of disunion, of which you would be the first victims—its first magistrate cannot, if he would, avoid the performance of his duty—the consequence must be fearful for you, distressing to your fellow-citizens here, and to the friends of good government throughout the world. Its enemies have beheld our prosperity with a vexation they could not conceal—it was a standing refutation of their slavish doctrines, and they will point to our discord with the triumph of malignant joy. It is yet in your power to disappoint them. There is yet time to show that the descendants of the Pinckneys, the Sumpters, the Rutledges, and of the thousand other names which adorn the pages of your Revolutionary history, will not abandon that Union to support which so many of them fought and bled and died. I adjure you, as you honor their memory—as you love the cause of freedom, to which they dedicated their lives—as you prize the peace of your country, the lives of its best citizens, and your own fair fame, to retrace your steps. Snatch from the archives of your State the disorganizing edict of its convention—bid its members to re-assemble and promulgate the decided expressions of your will to remain in the path which alone can conduct you to safety, prosperity, and honor—tell them that compared to disunion, all other evils are light, because that brings with it an accumulation of all—declare that you will never take the field unless the star-spangled banner of your country shall float over you—that you will not be stigmatized when dead, and dishonored and scorned while you live, as the authors of the first attack on the Constitution of your country!—its destroyers you cannot be. You may disturb its peace—you may interrupt the course of its prosperity—you may cloud its reputation for stability—but its tranquillity will be restored, its prosperity will return, and the stain upon its national character will be transferred and remain an eternal blot on the memory of those who caused the disorder.

Fellow-citizens of the United States! the threat of unhallowed disunion—the names of those, once respected, by whom it is uttered—the array of military force to support it—denote the approach of a crisis in our affairs on which the continuance of our unexampled prosperity, our political existence, and perhaps that of all free governments, may depend. The conjuncture demanded a free, a full, and explicit enunciation, not only of my intentions, but of my principles of action; and as the claim was asserted of a right by a State to annul the laws of the Union, and even to secede from it at pleasure, a frank exposition of my opinions in relation to the origin and form of our government, and the construction I give to the instrument by which it was created, seemed to be proper. Having the fullest confidence in the justness of the legal and constitutional opinion of my duties which has been expressed, I rely with equal confidence on your undivided support in my determination to execute the laws—to preserve the Union by all constitutional means—to arrest, if possible, by moderate but firm

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measures, the necessity of a recourse to force; and, if it be the will of Heaven that the recurrence of its primeval curse on man for the shedding of a brother's blood should fall upon our land, that it be not called down by any offensive act on the part of the United States.

Fellow-citizens! the momentous case is before you. On your undivided support of your government depends the decision of the great question it involves, whether your sacred Union will be preserved, and the blessing it secures to us as one people shall be perpetuated. No one can doubt that the unanimity with which that decision will be expressed, will be such as to inspire new confidence in republican institutions, and that the prudence, the wisdom, and the courage which it will bring to their defense, will transmit them unimpaired and invigorated to our children.

May the Great Ruler of nations grant that the signal blessings with which he has favored ours may not, by the madness of party, or personal ambition, be disregarded and lost, and may His wise providence bring those who have produced this crisis to see the folly, before they feel the misery, of civil strife, and inspire a returning veneration for that Union which, if we may dare to penetrate his designs, he has chosen, as the only means of attaining the high destinies to which we may reasonably aspire.

In testimony whereof, I have caused the seal of the United States to be hereunto affixed, having signed the same with my hand.

Done at the City of Washington, this 10th day of December, in the year of our Lord one thousand eight hundred and thirty-two, and of the independence of the United States the fifty-seventh.

ANDREW JACKSON.

By the President,
EDW. LIVINGSTON, Secretary of State.

ABSTRACT OF THE DRED SCOTT DECISION, 1857.*

. . . But, in making this objection, we think the peculiar and limited jurisdiction of courts of the United States has not been adverted to. This peculiar and limited jurisdiction has made it necessary, in these courts, to adopt different rules and principles of pleading, so far as jurisdiction is concerned, from those which regulate courts of common law in England, and in the different states of the Union which have adopted the common-law rules. . . .

This difference arises, as we have said, from the peculiar character of the government of the United States. For although it is sovereign and supreme in its appropriate sphere of action, yet it does not possess all the powers which usually belong to the sovereignty of a nation. Certain specified powers, enumerated in the Constitution, have been conferred upon it; and neither the

* In full in 19 How. 393.

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legislative, executive, nor judicial departments of the government can lawfully exercise any authority beyond the limits marked out by the Constitution. And in regulating the judicial department, the cases in which the courts of the United States shall have jurisdiction are particularly and specifically enumerated and defined; and they are not authorized to take cognizance of any case which does not come within the description therein specified. Hence, when a plaintiff sues in a court of the United States, it is necessary that he should show, in his pleading, that the suit he brings is within the jurisdiction of the court, and that he is entitled to sue there. . . . In this case, the citizenship is averred, but it is denied by the defendant in the manner required by the rules of pleading, and the fact upon which the denial is based is admitted by the demurrer. And, if the plea and demurrer, and judgment of the court below upon it, are before us upon this record, the question to be decided is, whether the facts stated in the plea are sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States. . . .

This is certainly a very serious question, and one that now for the first time has been brought for decision before this court. But it is brought here by those who have a right to bring it, and it is our duty to meet it and decide it.

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.

It will be observed, that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country, and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a state, in the sense in which the word citizen is used in the Constitution of the United States. And this being the only matter in dispute on the pleadings, the court must be understood as speaking in this opinion of that class only. That is, of those persons who are the descendants of Africans who were imported into this country, and sold as slaves. . . .

The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are

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constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them.

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

In discussing this question we must not confound the rights of citizenship which a state may confer within its own limits; and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a state, that he must be a citizen of the United States. He may have all the rights and privileges of the citizen of a state, and yet not be entitled to the rights and privileges of a citizen in any other state. For, previous to the adoption of the Constitution of the United States, every state had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character of course was confined to the boundaries of the state, and gave him no rights or privileges in other states beyond those secured to him by the laws of nations and the comity of states. Nor have the several states surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each state may still confer them upon an alien, or anyone it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other states. The rights which he would acquire would be restricted to the state which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no state, since the adoption of the Constitution, can by naturalizing an alien invest him with the rights and privileges secured to a citizen of a state under the federal government, although, so far as the state alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the constitution and laws of the state attached to that character.

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It is very clear, therefore, that no state can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it.

The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a state should be entitled, embraced the negro African race, at that time in this country, or who might afterward be imported, who had then or should afterward be made free in any state; and to put it in the power of a single state to make him a citizen of the United States, and endue him with the full rights of citizenship in every other state without their consent? Does the Constitution of the United States act upon him whenever he shall be made free under the laws of the state, and raised there to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other state, and in its own courts?

The court think the affirmative of these propositions cannot be maintained. And if it cannot, the plaintiff in error could not be a citizen of the State of Missouri, within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts.

SOUTH CAROLINA ORDINANCE OF SECESSION, 1860.

An ordinance to dissolve the Union between the State of South Carolina and other States united with her under the compact entitled "The Constitution of the United States of America."

We, the People of the State of South Carolina, in Convention assembled, do declare and ordain, and it is hereby declared and ordained, that the Ordinance adopted by us in Convention, on the Twenty-third of May, in the year of our Lord one thousand seven hundred and eighty-eight, whereby the Constitution of the United States was ratified, and also all other Acts and parts of Acts of the General Assembly of the State ratifying amendments of the said Constitution, are hereby repealed, and the union now subsisting between South Carolina and other States, under the name of the United States of America, is hereby dissolved.

SOUTH CAROLINA DECLARATION OF INDEPENDENCE, 1860.

The State of South Carolina, having determined to resume her separate and equal place among nations, deems it due to herself, to the remaining United States of America, and to the nations of the world that she should declare the causes which have led to this act.

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In the year 1765, that portion of the British empire embracing Great Britain, undertook to make laws for the government of that portion composed of the thirteen American colonies. A struggle for the right of self-government ensued, which resulted, on the 4th of July, 1776, in a declaration by the colonies, "that they are, and of right ought to be, free and independent states, and that, as free and indedendent states, they have full power to levy war, to conclude peace, contract alliances, establish commerce, and do all other acts and things which independent states may of right do."

They further solemnly declare, that whenever any "form of government becomes destructive of the ends for which it was established, it is the right of that people to alter or abolish it, and to institute a new government." Deeming the government of Great Britain to have become destructive of these ends, they declared that the colonies "are absolved from all allegiance to the British crown, and that all political connection between them and the States of Great Britain is and ought to be totally dissolved."

In pursuance of this declaration of independence, each of the thirteen states proceeded to exercise its separate sovereignty; adopted for itself a constitution, and appointed officers for the administration of government in all its departments—legislative, executive, and judicial. For purpose of defense, they united their arms and their counsels; and, in 1778, they united in a league, known as the articles of confederation, whereby they agreed to intrust the administration of their external relations to a common agent, known as the Congress of the United States, expressly declaring in the first article, "that each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not, by this confederation, expressly delegated to the United States in Congress assembled."

Under this confederation the war of the Revolution was carried on, and on the 3d of September, 1783, the contest ended, and a definite treaty was signed by Great Britain, in which she acknowledged the independence of the colonies in the following terms:

"Article I. His Britannic Majesty acknowledges the said United States, viz.: New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantation, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, to be free, sovereign, and independent states; that he treats them as such; and for himself, his heirs, and successors, relinquishes all claim to the government, proprietary and territorial rights of the same, and every part thereof."

Thus was established the two great principles asserted by the colonies, namely, the right of a state to govern itself, and the right of a people to abolish a government when it becomes destructive of the ends for which it was instituted. And concurrent with the establishment of these principles was the fact, that each colony became and was recognized by the mother country as a free, sovereign, and independent state.

In 1787, deputies were appointed by the states to revise the articles of Confederation, and on September 17th, 1787, the

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deputies recommended for the adoption of the states the articles of union known as the constitution of the United States.

The parties to whom the constitution was submitted were the several sovereign states; they were to agree or disagree, and when nine of them agreed, the compact was to take effect among those concurring; and the general government, as the common agent, was then to be vested with their authority.

If only nine of the thirteen states had concurred, the other four would have remained as they then were—separate, sovereign states, independent of any of the provisions of the constitution. In fact, two of the states did not accede to the constitution until long after it had gone into operation among the other eleven; and during that interval, they exercised the functions of an independent nation.

By this constitution, certain duties were charged on the several states, and the exercise of certain of their powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. On the 23d of May, 1788, South Carolina, by a convention of her people, passed an ordinance assenting to this constitution, and afterwards altering her own constitution to conform herself to the obligation she had undertaken.

Thus was established, by compact between the states, a government with defined objects and powers, limited to the express words of the grant, and to so much more only as was necessary to execute the power granted. The limitations left the whole remaining mass of power subject to the clause reserving it to the state or to the people, and rendered unnecessary any specification of reserved powers.

We hold that the government thus established is subject to the two great principles asserted in the declaration of independence, and we hold further that the mode of its formation subjects it to a third fundamental principle, namely—the law of compact. We maintain that in every compact between two or more parties, the obligation is mutual—that the failure of one of the contracting parties to perform a material part of the agreement entirely releases the obligation of the other, and that, where no arbiter is appointed, each party is remitted to his own judgment to determine the fact of failure with all its consequences.

In the present case that fact is established with certainty. We assert that fifteen of the states have deliberately refused for years past to fulfill their constitutional obligation, and we refer to their own statutes for the proof.

The constitution of the United States, in its fourth article, provides as follows:

"No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from any service or labor, but shall be delivered up, on claim of the party to whom such service or labor may be due."

This stipulation was so material to the compact that without it that compact would not have been made. The greater number

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of the contracting parties held slaves, and the state of Virginia had previously declared her estimate of its value by making it the condition of cession of the territory which now composes the states north of the Ohio river.

The same article of the Constitution stipulates also for the rendition by the several states of fugitives from justice from the other states.

The general government, as the common agent, passed laws to carry into effect these stipulations of the states. For many years these laws were executed. But an increasing hostility on the part of the northern states to the institution of slavery has led to a disregard of their obligations, and the laws of the general government have ceased to effect the objects of the constitution. The states of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, Pennsylvania, Illinois, Indiana, Ohio, Michigan, Wisconsin, and Iowa have enacted laws which either nullify the acts of Congress, or render useless any attempt to execute them. In many of these states the fugitive is discharged from the service of labor claimed, and in none of them has the state government complied with the stipulation made in the constitution. The state of New Jersey, at an early day, passed a law for the rendition of fugitive slaves in conformity with her constitutional undertaking; but the current of anti-slavery feeling has led her more recently to enact laws which render inoperative the remedies provided by her own law, and by the laws of Congress. In the state of New York even the right of transit for a slave has been denied by her tribunals, and the states of Ohio and Iowa have refused to surrender to justice fugitives charged with murder and inciting servile insurrection in the state of Virginia. Thus the constitutional compact has been deliberately broken and disregarded by the non-slaveholding states, and the consequence follows that South Carolina is released from its obligation.

The ends for which this constitution was framed are declared by itself to be "to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, protect the general welfare, and secure the blessings of liberty to ourselves and posterity."

These ends it endeavored to accomplish by a federal government, in which each state was recognized as an equal, and had separate control over its own institutions. The right of property in slaves was recognized by giving to free persons distinct political rights; by giving them the right to represent, and burdening them with direct taxes for three-fifths of their slaves; by authorizing the importation of slaves for twenty years, and by stipulating for the rendition of fugitives from labor.

We affirm that these ends for which this government was instituted have been defeated, and the government itself has been made destructive of them by the action of the non-slaveholding state. These states have assumed the right of deciding upon the propriety of our domestic institutions, and have denied the rights of property established in fifteen of the states and recognized by the con-

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stitution; they have denounced as sinful the institution of slavery; they have permitted the open establishment among them of societies whose avowed object is to disturb the peace and claim the property of the citizens of other states. They have encouraged and assisted thousands of our slaves to leave their homes, and those who remain have been incited by emissaries, books, and pictures to servile insurrection.

For seventy-five years this agitation has been steadily increasing, until it has now secured to its aid the power of the common government. Observing the forms of the constitution, a sectional party has found within that article establishing the executive department the means of subverting the constitution itself. A geographical line has been drawn across the Union, and all the states north of that line have united in the election of a man to the high office of President of the United States, whose opinions and purposes are hostile to slavery. He is to be intrusted with the administration of the common government, because he has declared that that "government cannot endure permanently half slave, half free," and that the public mind must rest in the belief that slavery is in the course of ultimate extinction.

This sectional combination for the subversion of the constitution has been aided in some of the states by elevating to citizenship persons who, by the supreme law of the land, are incapable of becoming citizens, and their votes have been used to inaugurate a new policy hostile to the south, and destructive of its peace and safety.

On the 4th of March next, this party will take possession of the government. It has announced that the south shall be excluded from the common territory; that the judicial tribunals shall be made sectional, and that a war must be waged against slavery until it shall cease throughout the United States.

The guarantees of the constitution will then no longer exist; the equal rights of the states will be lost. The slaveholding states will no longer have the power of self-government or self-protection, and the federal government will have become their enemies.

Sectional interest and animosity will deepen the irritation, and all hope of remedy is rendered vain by the fact that public opinion at the north has invested a great political error with the sanctions of a more erroneous religious belief.

We, therefore, the people of South Carolina, by our delegates in convention assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, have solemnly declared that the union heretofore existing between this state and the other states of North America is dissolved, and that the state of South Carolina has resumed her position among the nations of the world as a free, sovereign, and independent state, with full powers to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may, of right, do.

And, for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other, our lives, our fortunes, and our sacred honor.

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AMENDMENTS PROPOSED IN CONGRESS BY CRITTENDEN, 1861.

Whereas, serious and alarming dissensions have arisen between the Northern and Southern States, concerning the rights and security of the rights of the slaveholding States, and especially their rights in the common territory of the United States; and whereas it is eminently desirable and proper that these dissensions, which now threaten the very existence of this Union, should be permanently quieted and settled by constitutional provisions, which shall do equal justice to all sections, and thereby restore to the people that peace and good will which ought to prevail between all the citizens of the United States: Therefore,

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of both Houses concurring), That the following articles be, and are hereby, proposed and submitted as amendments to the Constitution of the United States, which shall be valid to all intents and purposes, as part of said Constitution, when ratified by conventions of three-fourths of the several States:

ARTICLE I.

In all the territory of the United States now held, or hereafter acquired, situated north of latitude 36° 30', slavery or involuntary servitude, except as a punishment for crime, is prohibited while such territory shall remain under territorial government. In all the territory south of said line of latitude, slavery of the African race is hereby recognized as existing, and shall not be interfered with by Congress, but shall be protected as property by all the departments of the territorial government during its continuance. And when any Territory, north or south of said line, within such boundaries as Congress may prescribe, shall contain the population requisite for a member of Congress according to the then Federal ratio of representation of the people of the United States, it shall, if its form of government be republican, be admitted into the Union, on an equal footing with the original States, with or without slavery, as the constitution of such new State may provide.

ARTICLE II.

Congress shall have no power to abolish slavery in places under its exclusive jurisdiction, and situate within the limits of States that permit the holding of slaves.

ARTICLE III.

Congress shall have no power to abolish slavery within the District of Columbia, so long as it exists in the adjoining States of Virginia and Maryland, or either, nor without the consent of the inhabitants, nor without just compensation first made to such owners of slaves as do not consent to such abolishment. Nor shall Congress at any time prohibit officers of the Federal

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Government, or members of Congress, whose duties require them to be in said District, from bringing with them their slaves, and holding them as such, during the time their duties may require them to remain there, and afterward taking them from the District.

ARTICLE IV.

Congress shall have no power to prohibit or hinder the transportation of slaves from one State to another, or to a Territory in which slaves are by law permitted to be held, whether that transportation be by land, navigable rivers, or by the sea.

ARTICLE V.

That in addition to the provisions of the third paragraph of the second section of the fourth article of the Constitution of the United States, Congress shall have power to provide by law, and it shall be its duty so to provide, that the United States shall pay to the owner who shall apply for it, the full value of his fugitive slave in all cases when the marshal or other officer whose duty it was to arrest said fugitive was prevented from so doing by violence or intimidation, or when, after arrest, said fugitive was rescued by force, the owner thereby prevented and obstructed in the pursuit of his remedy for the recovery of his fugitive slave under the said clause of the Constitution and the laws made in pursuance thereof. And in all such cases, when the United States shall pay for such fugitive, they shall have the right, in their own name, to sue the county in which said violence, intimidation, or rescue was committed, and to recover from it, with interest and damages, the amount paid by them for said fugitive slave. And the said county, after it has paid said amount to the United States, may, for its idemnity, sue and recover from the wrongdoers or rescuers by whom the owner was prevented from the recovery of his fugitive slave, in like manner as the owner himself might have sued and recovered.

ARTICLE VI.

No future amendment of the Constitution shall affect the five preceding articles; nor the third paragraph of the second section of the first article of the Constitution; nor the third paragraph of the second section of the fourth article of said Constitution, and no amendment shall be made to the Constitution which shall authorize or give to Congress any power to abolish or interfere with slavery in any of the States by whose laws it is, or may be allowed or permitted.

And whereas, also, besides these causes of dissension embraced in the foregoing amendments proposed to the Constitution of the United States, there are others which come within the jurisdiction of Congress, as far as its power will extend, to remove all just cause for the popular discontent and agitation which now disturb the peace of the country, and threaten the stability of its institutions: Therefore,

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1. Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the laws now in force for the recovery of fugitive slaves are in strict pursuance of the plain and mandatory provisions of the Constitution, and have been sanctioned as valid and constitutional by the judgment of the Supreme Court of the United States; that the slaveholding States are entitled to the faithful observance and execution of those laws, and that they ought not to be repealed, or so modified or changed as to impair their efficiency; and that laws ought to be made for the punishment of those who attempt by rescue of the slave, or other illegal means, to hinder or defeat the due execution of said laws.

2. That all State laws which conflict with the fugitive slave acts of Congress, or any other constitutional acts of Congress, or which, in their operation, impede, hinder, or delay the free course and due execution of any of said acts, are null and void by the plain provisions of the Constitution of the United States; yet those State laws, void as they are, have given color to practice, and led to consequences which have obstructed the due administration and execution of acts of Congress, and especially the acts for the delivery of fugitive slaves, and have thereby contributed much to the discord and commotion now prevailing. Congress, therefore, in the present perilous juncture, does not deem it improper, respectfully and earnestly to recommend the repeal of those laws to the several States which have enacted them, or such legislative corrections or explanations of them as may prevent their being used or perverted to such mischievous purposes.

3. That the act of the 18th of September, 1850, commonly called the fugitive slave law, ought to be so amended as to make the fee of the commissioner, mentioned in the eighth section of the act, equal in amount, in the cases decided by claimant. And to avoid misconstruction, the last clause of the fifth section of said act, which authorizes the person holding a warrant for the arrest or detention of a fugitive slave, to summon to his aid the *posse comitatus*, and which declares it to be the duty of all good citizens to assist him in its execution, ought to be so amended as to expressly limit the authority and duty to cases in which there shall be resistance or danger of resistance or rescue.

4. That the laws for the suppression of the African slave-trade, and especially those prohibiting the importation of slaves in the United States, ought to be made effectual, and ought to be thoroughly executed; and all further enactments necessary to those ends ought to be promptly made.

AMENDMENTS PROPOSED BY THE PEACE CONFERENCE, 1861.

ARTICLE XIII.

SECTION 1. In all the present territory of the United States, north of the parallel of 36° 30′ of north latitude, involuntary servitude, except in punishment of crime, is prohibited. In

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all the present Territory south of that line, the status of persons held to involuntary service or labor, as it now exists, shall not be changed; nor shall any law be passed by Congress or the Territorial Legislature to hinder or prevent the taking of such persons from any of the States of this Union to said Territory, nor to impair the rights arising from said relation; but the same shall be subject to judicial cognizance in the Federal courts, according to the course of the common law. When any Territory north or south of said line, within such boundary as Congress may prescribe, shall contain a population equal to that required for a member of Congress, it shall, if its form of government be republican, be admitted into the Union on an equal footing with the original States, with or without involuntary servitude, as the constitution of such State may provide.

SEC. 2. No Territory shall be acquired by the United States, except by discovery and for naval and commercial stations, depots, and transit routes, without the concurrence of a majority of all the Senators from States which allow involuntary servitude, and a majority of all the Senators from States which prohibit that relation; nor shall Territory be acquired by treaty, unless the votes of a majority of the Senators from each class of States hereinbefore mentioned be cast as a part of the two-thirds majority necessary to the ratification of such treaty.

SEC. 3. Neither the Constitution nor any amendment thereof shall be construed to give Congress power to regulate, abolish, or control, within any State the relation established or recognized by the laws thereof touching persons held to labor or involuntary service therein, nor to interfere with or abolish involuntary service in the District of Columbia without the consent of Maryland and without the consent of the owners, or making the owners who do not consent just compensation; nor the power to interfere with or prohibit Representatives and others from bringing with them to the District of Columbia, retaining, and taking away, persons so held to labor or service; nor the power to interfere with or abolish involuntary service in places under the exclusive jurisdiction of the United States within those States and Territories where the same is established or recognized; nor the power to prohibit the removal or transportation of persons held to labor or involuntary service in any State or Territory of the United States to any other State or Territory thereof where it is established or recognized by law or usage, and the right during transportation, by sea or river, of touching at ports, shores and landings, and of landing in case of distress, shall exist; but not the right of transit in or through any State or Territory, or of sale or traffic, against the laws thereof. Nor shall Congress have power to authorize any higher rate of taxation on persons held to labor or service than on land. The bringing into the District of Columbia of persons held to labor or service, for sale, or placing them in depots to be afterwards transferred to other places for sale as merchandise, is prohibited.

SEC. 4. The third paragraph of the second section of the fourth article of the Constitution shall not be construed to prevent any of

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the States, by appropriate legislation, and through the action of their judicial and ministerial officers, from enforcing the delivery of fugitives from labor to the person to whom such service or labor is due.

SEC. 5. The foreign slave-trade is hereby forever prohibited; and it shall be the duty of Congress to pass laws to prevent the importation of slaves, coolies, or persons held to service or labor, into the United States and the Territories from places beyond the limits thereof.

SEC. 6. The first, third and fifth sections, together with this section of these amendments, and the third paragraph of the second section of the first article of the Constitution, and the third paragraph of the second section of the fourth article thereof, shall not be amended or abolished without the consent of all the States.

SEC. 7. Congress shall provide by law that the United States shall pay to the owner the full value of his fugitive from labor, in all cases where the marshal or other officer, whose duty it was to arrest such fugitive, was prevented from so doing by violence and intimidation from mobs or riotous assemblages, or when after arrest such fugitive was rescued by like violence or intimidation, and the owner thereby deprived of the same; and the acceptance of such payment shall preclude the owner from further claim to such fugitive. Congress shall provide by law for securing to the citizens of each State the privileges and immunities of citizens in the several States.

CONSTITUTION OF THE CONFEDERATE STATES OF AMERICA, 1861.

We, the people of the Confederate States, each State acting in its sovereign and independent character, in order to form a permanent federal government, establish justice, insure domestic tranquillity, and secure the blessings of liberty to ourselves and our posterity—invoking the favor and guidance of Almighty God—do ordain and establish this Constitution of the Confederate States of America.

ARTICLE I.

SECTION 1. [1] All legislative powers herein delegated shall be vested in a Congress of the Confederate States, which shall consist of a Senate and House of Representatives.

SEC. 2. [1] The House of Representatives shall be composed of members chosen every second year by the people of the several States; and the electors in each State shall be citizens of the Confederate States, and have the qualifications requisite for electors of the most numerous branch of the State Legislature: but no person of foreign birth, not a citizen of the Confederate States, shall be allowed to vote for any officer, civil or political, State or federal.

[2] No person shall be a Representative who shall not have attained the age of twenty-five years, and be a citizen of the Confederate

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States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

[3] Representatives and direct taxes shall be apportioned among the several States which may be included within this Confederacy, according to their respective numbers—which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all slaves. The actual enumeration shall be made within three years after the first meeting of the Congress of the Confederate States, and within every subsequent term of ten years, in such manner as they shall, by law, direct. The number of Representatives shall not exceed one for every fifty thousand, but each State shall have, at least, one Representative; and until such enumeration shall be made, the State of South Carolina shall be entitled to choose six, the State of Georgia ten, the State of Alabama nine, the State of Florida two, the State of Mississippi seven, the State of Louisiana six, and the State of Texas six.

[4] When vacancies happen in the representation from any State, the Executive authority thereof shall issue writs of election to fill such vacancies.

[5] The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment; except that any judicial or other federal officer, resident and acting solely within the limits of any State, may be impeached by a vote of two-thirds of both branches of the Legislature thereof.

SEC. 3. [1] The Senate of the Confederate States shall be composed of two Senators from each State, chosen for six years by the Legislature thereof at the regular session next immediately preceding the commencement of the term of service; and each Senator shall have one vote.

[2] Immediately after they shall be assembled, in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year; of the second class, at the expiration of the fourth year; and of the third class, at the expiration of the sixth year; so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the Legislature of any State, the Executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies.

[3] No person shall be a Senator who has not attained the age of thirty years, and be a citizen of the Confederate States; and who shall not, when elected, be an inhabitant of the State for which he shall be chosen.

[4] The Vice President of the Confederate States shall be President of the Senate; but shall have no vote, unless they be equally divided.

[5] The Senate shall choose their other officers; and also a President *pro tempore* in the absence of the Vice President, or when he shall exercise the office of President of the Confederate States.

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[6] The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the Confederate States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

[7] Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the Confederate States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law.

SEC. 4. [1] The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof, subject to the provisions of this Constitution; but the Congress may, at any time, by law, make or alter such regulations, except as to the times and places of choosing Senators.

[2] The Congress shall assemble at least once in every year; and such meeting shall be on the first Monday in December, unless they shall, by law, appoint a different day.

SEC. 5. [1] Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each House may provide.

[2] Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds of the whole number, expel a member.

[3] Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House, on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

[4] Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

SEC. 6. [1] The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the Confederate States. They shall, in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

[2] No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the Confederate States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the Confederate States shall be a member of either House during his continuance in

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office. But Congress may, by law, grant to the principal officer in each of the Executive Departments a seat upon the floor of either House, with the privilege of discussing any measure appertaining to his department.

SEC. 7. [1] All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills.

[2] Every bill, which shall have passed both Houses, shall, before it becomes a law, be presented to the President of the Confederate States; if he approve, he shall sign it; but if not, he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If, after such reconsideration, two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a law. But, in all such cases, the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress, by their adjournment, prevent its return; in which case it shall not be a law. The President may approve any appropriation and disapprove any other appropriation in the same bill. In such case he shall, in signing the bill, designate the appropriations disapproved; and shall return a copy of such appropriations, with his objections, to the House in which the bill shall have originated; and the same proceedings shall then be had as in case of other bills disapproved by the President.

[3] Every order, resolution or vote, to which the concurrence of both Houses may be necessary (except on a question of adjournment), shall be presented to the President of the Confederate States; and before the same shall take effect, shall be approved by him; or being disapproved by him, shall be repassed by two-thirds of both Houses, according to the rules and limitations prescribed in case of a bill.

SEC. 8. The Congress shall have power—

[1] To lay and collect taxes, duties, imposts and excises for revenue necessary to pay the debts, provide for the common defense, and to carry on the government of the Confederate States; but no bounties shall be granted from the treasury; nor shall any duties or taxes on importations from foreign nations be laid to promote or foster any branch of industry; and all duties, imposts and excises shall be uniform throughout the Confederate States:

[2] To borrow money on the credit of the Confederate States:

[3] To regulate commerce with foreign nations, and among the several States, and with the Indian tribes; but neither this, nor any other clause contained in the Constitution, shall ever be construed to delegate the power to Congress to appropriate money for

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any internal improvement intended to facilitate commerce; except for the purpose of furnishing lights, beacons, and buoys, and other aids to navigation upon the coasts, and the improvement of harbors and the removing of obstructions in river navigation, in all which cases, such duties shall be laid on the navigation facilitated thereby, as may be necessary to pay the costs and expenses thereof:

[4] To establish uniform laws of naturalization, and uniform laws on the subject of bankruptcies, throughout the Confederate States, but no law of Congress shall discharge any debt contracted before the passage of the same:

[5] To coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures:

[6] To provide for the punishment of counterfeiting the securities and current coin of the Confederate States:

[7] To establish post offices and post routes; but the expenses of the Post Office Department, after the first day of March, in the year of our Lord eighteen hundred and sixty-three, shall be paid out of its own revenues:

[8] To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries:

[9] To constitute tribunals inferior to the Supreme Court:

[10] To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations:

[11] To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water:

[12] To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years:

[13] To provide and maintain a navy:

[14] To make rules for the government and regulation of the land and naval forces:

[15] To provide for calling forth the militia to execute the laws of the Confederate States, suppress insurrections, and repel invasions:

[16] To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the Confederate States; reserving to the States, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress:

[17] To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of one or two States and the acceptance of Congress, become the seat of the Government of the Confederate States; and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings: and

[18] To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the Confederate States, or in any department or officer thereof.

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SEC. 9. [1] The importation of negroes of the African race, from any foreign country, other than the slaveholding States or Territories of the United States of America, is hereby forbidden; and Congress is required to pass such laws as shall effectually prevent the same.

[2] Congress shall also have power to prohibit the introduction of slaves from any State not a member of, or Territory not belonging to, this Confederacy.

[3] The privilege of the *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

[4] No bill of attainder, *ex post facto* law, or law denying or impairing the right of property in negro slaves, shall be passed.

[5] No capitation or other direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken.

[6] No tax or duty shall be laid on articles exported from any State, except by a vote of two-thirds of both Houses.

[7] No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another.

[8] No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

[9] Congress shall appropriate no money from the treasury except by a vote of two-thirds of both Houses, taken by yeas and nays, unless it be asked and estimated for by some one of the heads of department, and submitted to Congress by the President; or for the purpose of paying its own expenses and contingencies; or for the payment of claims against the Confederate States, the justice of which shall have been judicially declared by a tribunal for the investigation of claims against the Government, which it is hereby made the duty of Congress to establish.

[10] All bills appropriating money shall specify, in federal currency, the exact amount of each appropriation, and the purposes for which it is made; and Congress shall grant no extra compensation to any public contractor, officer, agent, or servant after such contract shall have been made, or such service rendered.

[11] No title of nobility shall be granted by the Confederate States; and no person holding any office of profit or trust under them shall, without the consent of Congress, accept of any present, emolument, office or title, of any kind whatever, from any king, prince, or foreign State.

[12] Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and petition the Government for a redress of grievances.

[13] A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

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[14] No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

[15] The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[16] No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; nor be compelled in any criminal case, to be a witness against himself; nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

[17] In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

[18] In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact so tried by a jury shall be otherwise re-examined in any court of the Confederacy, than according to the rules of the common law.

[19] Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

[20] Every law or resolution having the force of law, shall relate to but one subject, and that shall be expressed in the title.

SEC. 10. [1] No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, or *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility.

[2] No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the treasury of the Confederate States; and all such laws shall be subject to the revision and control of Congress.

[3] No State shall, without the consent of Congress, lay any duty on tonnage, except on sea-going vessels, for the improvement of its rivers and harbors navigated by the said vessels; but such duties shall not conflict with any treaties of the Confederate States

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with foreign nations, and any surplus revenue, thus derived, shall, after making such improvement, be paid into the common treasury; nor shall any State keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay. But when any river divides or flows through two or more States, they may enter into compacts with each other to improve the navigation thereof.

ARTICLE II.

SECTION 1. [1] The executive power shall be vested in a President of the Confederate States of America. He and the Vice President shall hold their offices for the term of six years; but the President shall not be re-eligible. The President and Vice President shall be elected as follows:

[2] Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the Confederate States, shall be appointed an elector.

[3] The electors shall meet in their respective States and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and of the number of votes for each, which list they shall sign and certify, and transmit, sealed, to the seat of the government of the Confederate States, directed to the President of the Senate; the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then, from the persons having the highest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in case of the death, or other constitutional disability of the President.

[4] The person having the greatest number of votes as Vice President shall be the Vice President, if such number be a majority of

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the whole number of electors appointed; and, if no person have a majority, then, from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice.

[5] But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the Confederate States.

[6] The Congress may determine the time of choosing the electors and the day on which they shall give their votes; which day shall be the same throughout the Confederate States.

[7] No person, except a natural born citizen of the Confederate States, or a citizen thereof, at the time of the adoption of this Constitution, or a citizen thereof born in the United States prior to the 20th of December, 1860, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained the age of thirty-five years, and been fourteen years a resident within the limits of the Confederate States as they may exist at the time of his election.

[8] In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of that said office, the same shall devolve on the Vice President; and the Congress may, by law, provide for the case of removal, death, resignation, or inability both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed or a President shall be elected.

[9] The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected; and he shall not receive within that period any other emolument from the Confederate States, or any of them.

[10] Before he enters on the execution of his office, he shall take the following oath or affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the Confederate States, and will, to the best of my ability, preserve, protect, and defend the Constitution thereof."

SEC. 2. [1] The President shall be commander-in-chief of the army and navy of the Confederate States, and of the militia of the several States, when called into the actual service of the Confederate States; he may require the opinion, in writing, of the principal officer in each of the Executive Departments, and upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offenses against the Confederate States, except in cases of impeachment.

[2] He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, Judges of the Supreme Court,

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and all other officers of the Confederate States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may, by law, vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of Departments.

[3] The principal officer in each of the Executive Departments, and all persons connected with the diplomatic service, may be removed from office at the pleasure of the President. All other civil officers of the Executive Department may be removed at any time by the President, or other appointing power, when their services are unnecessary, or for dishonesty, incapacity, inefficiency, misconduct, or neglect of duty; and when so removed, the removal shall be reported to the Senate, together with the reasons therefor.

[4] The President shall have power to fill all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session; but no person rejected by the Senate shall be reappointed to the same office during their ensuing recess.

SEC. 3. [1] The President shall, from time to time, give to the Congress information of the State of the Confederacy, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them; and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such a time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the Confederate States.

SEC. 4. [1] The President, Vice President, and all civil officers of the Confederate States, shall be removed from office on impeachment for, and conviction of, treason, bribery or other high crimes and misdemeanors.

ARTICLE III.

SECTION 1. [1] The judicial power of the Confederate States shall be vested in one Supreme Court, and in such Inferior Courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and Inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

SEC. 2. [1] The judicial power shall extend to all cases arising under this Constitution, the laws of the Confederate States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the Confederate States shall be a party; to controversies between two or more States; between a State and citizens of another State where the State is plaintiff; between

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citizens claiming lands under grants of different States, and be-between a State or the citizens thereof, and foreign States, citizens or subjects; but no State shall be sued by a citizen or subject of any foreign State.

[2] In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make.

[3] The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SEC. 3. [1] Treason against the Confederate States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

[2] The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV.

SECTION 1. [1] Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

SEC. 2. [1] The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, and shall have the right of transit and sojourn in any State of this Confederacy, with their slaves and other property; and the right of property in said slaves shall not be thereby impaired.

[2] A person charged in any State with treason, felony, or other crime against the laws of such State, who shall flee from justice, and be found in another State, shall, on demand of the Executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime.

[3] No slave or other person held to service or labor in any State or territory of the Confederate States, under the laws thereof, escaping or lawfully carried into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up on claim of the party to whom such slave belongs, or to whom such service or labor may be due.

SEC. 3. [1] Other States may be admitted into this Confederacy by a vote of two-thirds of the whole House of Representatives, and two-thirds of the Senate, the Senate voting by States; but no new State shall be formed or erected within the jurisdiction of any

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other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned, as well as of the Congress.

[3] The Congress shall have power to dispose of and make all needful rules and regulations concerning the property of the Confederate States, including the lands thereof.

[3] The Confederate States may acquire new territory; and Congress shall have power to legislate and provide governments for the inhabitants of all territory belonging to the Confederate States, lying without the limits of the several States; and may permit them, at such times, and in such manner as it may by law provide, to form States to be admitted into the Confederacy. In all such territory, the institution of negro slavery as it now exists in the Confederate States, shall be recognized and protected by Congress, by the territorial government; and the inhabitants of the several Confederate States and Territories, shall have the right to take to such territory any slaves, lawfully held by them in any of the States or territories of the Confederate States.

[4] The Confederate States shall guarantee to every State that now is or hereafter may become a member of this Confederacy, a republican form of government, and shall protect each of them against invasion; and on application of the Legislature (or of the Executive, when the Legislature is not in session) against domestic violence.

ARTICLE V.

[1] Upon the demand of any three States, legally assembled in their several Conventions, the Congress shall summon a convention of all the States, to take into consideration such amendments to the Constitution as the said States shall concur in suggesting at the time when the said demand is made; and should any of the proposed amendments to the Constitution be agreed on by the said Convention—voting by States—and the same be ratified by the Legislatures of two-thirds of the several States, or by Conventions in two-thirds thereof—as the one or the other mode of ratification may be proposed by the general Convention—they shall thenceforward form a part of this Constitution. But no State shall, without its consent, be deprived of its equal representation in the Senate.

ARTICLE VI.

[1] The Government established by this Constitution is the successor of the Provisional Government of the Confederate States of America, and all the laws passed by the latter shall continue in force until the same shall be repealed or modified; and all the officers appointed by the same shall remain in office until their successors are appointed and qualified, or the offices abolished.

[2] All debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the Confederate States under this Constitution as under the Provisional Government.

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[3] This Constitution, and the laws of the Confederate States, made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the Confederate States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

[4] The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the Confederate States and of the several States, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the Confederate States.

[5] The enumeration, in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people of the several States.

[6] The powers not delegated to the Confederate States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people thereof.

ARTICLE VII.

[1] The ratification of the conventions of five States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

[2] When five States shall have ratified this Constitution, in the manner above specified, the Congress under the Provisional Constitution shall prescribe the time for holding the election of President and Vice President; and, for the meeting of the Electoral College; and, for counting the votes, and inaugurating the President. They shall, also, prescribe the time for holding the first election of members of Congress under this Constitution, and the time for assembling the same. Until the assembling of such Congress, the Congress under the Provisional Constitution shall continue to exercise the legislative powers granted them; not extending beyond the time limited by the Constitution of the Provisional Government.

ACT CREATING AN ELECTORAL COMMISSION, 1877.

AN ACT to provide for and regulate the counting of votes for President and Vice President, and the decision of questions arising thereon, for the term commencing March fourth, anno Domini eighteen hundred and seventy-seven.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Senate and House of Representatives shall meet in the hall of the House of Representatives, at the hour of one o'clock post meridian, on the first Thursday in February, anno Domini eighteen hundred and seventy-seven; and the President of the Senate shall be

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their presiding officer. Two tellers shall be previously appointed on the part of the Senate, and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates, and papers purporting to be certificates, of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers having then read the same in the presence and hearing of the two houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted as in this act provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, and the names of the persons, if any, elected, which announcement shall be deemed a sufficient declaration of the persons elected President and Vice President of the United States, and, together with a list of the votes, be entered on the journals of the two houses. Upon such reading of any such certificate or paper when there shall be only one return from a State, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State from which but one return has been received shall be rejected except by the affirmative vote of the two houses. When the two houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the question submitted.

SECTION 2. That if more than one return, or paper purporting to be a return from a State, shall have been received by the President of the Senate, purporting to be the certificates of electoral votes given at the last preceding election for President and Vice President in such State (unless they shall be duplicates of the same return,) all such returns and papers shall be opened by him in the presence of the two houses when met as aforesaid, and read by the tellers, and all such returns and papers shall thereupon be submitted to the judgment and decision as to which is the true and lawful electoral vote of such State, of a commission constituted as follows, namely: During the session of each house on the Tuesday next preceding the first Thursday in February, eighteen hundred and seventy-seven, each house shall, by viva voce vote, appoint five of its members, who with the five associate justices of the Supreme Court of the United States, to be ascertained as hereinafter provided, shall constitute a commission for the decision of all questions upon or in respect of such double returns named in this section. On the

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Tuesday next preceding the first Thursday in February, anno Domini eighteen hundred and seventy-seven, or as soon thereafter as may be, the associate justices of the Supreme Court of the United States now assigned to the first, third, eighth, and ninth circuits shall select, in such manner as a majority of them shall deem fit, another of the associate justices of said court, which five persons shall be members of said commission; and the person longest in commission of said five justices shall be the president of said commission. The members of said commission shall respectively take and subscribe the following oath: "I, —— ——, do solemnly swear (or affirm, as the case may be) that I will impartially examine and consider all questions submitted to the commission of which I am a member, and a true judgment give thereon, agreeably to the Constitution and the laws: so help me God;" which oath shall be filed with the Secretary of the Senate. When the commission shall have been thus organized, it shall not be in the power of either house to dissolve the same, or to withdraw any of its members; but if any such Senator or member shall die or become physically unable to perform the duties required by this act, the fact of such death or physical inability shall be by said commission, before it shall proceed further, communicated to the Senate or House of Representatives, as the case may be, which body shall immediately and without debate proceed by viva voce vote to fill the place so vacated, and the person so appointed shall take and subscribe the oath hereinbefore prescribed, and become a member of said commission; and, in like manner, if any of said justices of the Supreme Court shall die or become physically incapable of performing the duties required by this act, the other of said justices, members of the said commission, shall immediately appoint another justice of said court a member of said commission, and, in such appointments, regard shall be had to the impartiality and freedom from bias sought by the original appointments to said commission, who shall thereupon immediately take and subscribe the oath hereinbefore prescribed, and become a member of said commission to fill the vacancy so occasioned. All the certificates and papers purporting to be certificates of the electoral votes of each State shall be opened, in the alphabetical order of the States, as provided in section one of this act; and when there shall be more than one such certificate or paper, as the certificate and papers from such State shall so be opened, (excepting duplicates of the same return,) they shall be read by the tellers, and thereupon the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one member of the House of Representatives before the same shall be received. When all such objections so made to any certificate, vote, or paper from a State shall have been received and read, all such certificates, votes, and papers so objected to, and all papers accompanying the same, together with such objections, shall be forthwith submitted to said commission, which shall proceed to consider the same, with the same

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powers, if any, now possessed for that purpose by the two houses acting separately or together, and, by a majority of votes, decide whether any and what votes from such State are the votes provided for by the Constitution of the United States, and how many and what persons were duly appointed electors in such State, and may therein take into view such petitions, depositions, and other papers, if any, as shall, by the Constitution and now existing law, be competent and pertinent in such consideration; which decision shall be made in writing, stating briefly the ground thereof, and signed by the members of said commission agreeing therein; whereupon the two houses shall again meet, and such decision shall be read and entered in the journal of each house, and the counting of the votes shall proceed in conformity therewith, unless, upon objection made thereto in writing by at least five Senators and five members of the House of Representatives, the two houses shall separately concur in ordering otherwise, in which case such concurrent order shall govern. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

SEC. 3. That while the two houses shall be in meeting, as provided in this act, no debate shall be allowed and no question shall be put by the presiding officer, except to either house on a motion to withdraw; and he shall have power to preserve order.

SEC. 4. That when the two houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any State, or upon objection to a report of said commission, or other question arising under this act, each Senator and Representative may speak to such objection or question ten minutes, and not oftener than once; but after such debate shall have lasted two hours, it shall be the duty of each house to put the main question without further debate.

SEC. 5. That at such joint meeting of the two houses, seats shall be provided as follows: For the President of the Senate, the Speaker's chair; for the Speaker, immediately upon his left; the Senators in the body of the hall upon the right of the presiding officer; for the Representatives, in the body of the hall not provided for the Senators; for the tellers, Secretary of the Senate, and Clerk of the House of Representatives, at the Clerk's desk; for the other officers of the two houses, in front of the Clerk's desk and upon each side of the Speaker's platform. Such joint meeting shall not be dissolved until the count of electoral votes shall be completed and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting any such votes, or otherwise under this act, in which case it shall be competent for either house, acting separately, in the manner hereinbefore provided, to direct a recess of such house not beyond the next day, Sunday excepted, at the hour of ten o'clock in the forenoon. And while any question is being considered by said commission, either house may proceed with its legislative or other business.

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SEC. 6. That nothing in this act shall be held to impair or affect any right now existing under the Constitution and laws to question, by proceeding in the judicial courts of the United States, the right or title of the person who shall be declared elected, or who shall claim to be President or Vice President of the United States, if any such right exists.

SEC. 7. That said commission shall make its own rules, keep a record of its proceedings, and shall have power to employ such persons as may be necessary for the transaction of its business and the execution of its powers.

Approved, January 29, 1877.

ABSTRACT OF THE DECISION IN THIRD LEGAL TENDER CASE, 1884.*

. . . The single question, therefore, to be considered, and upon the answer to which the judgment to be rendered between these parties depends, is whether notes of the United States, issued in time of war, under acts of Congress declaring them to be a legal tender in payment of private debts, and afterward in time of peace redeemed and paid in gold coin at the treasury, and then reissued under the act of 1878, can, under the Constitution of the United States, be a legal tender in payment of such debts.

. . . No question of the scope and extent of the implied powers of Congress under the Constitution can be satisfactorily discussed without repeating much of the reasoning of Chief Justice Marshall in the great judgment in McCulloch *vs.* Maryland, (4 Wheat. 316), by which the power of Congress to incorporate a bank was demonstrated and affirmed, notwithstanding the Constitution does not enumerate, among the powers granted, that of establishing a bank or creating a corporation.

The people of the United States by the Constitution established a National Government, with sovereign powers, legislative, executive and judicial. "The Government of the Union," said Chief Justice Marshall, "though limited in its powers, is supreme within its sphere of action;" "and its laws, when made in pursuance of the Constitution, form the supreme law of the land." "Among the enumerated powers of Government we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation are entrusted to its government" (4 Wheat. 405, 406, 407).

A constitution establishing a frame of government, declaring fundamental principles, and creating a national sovereignty, and intended to endure for ages, and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract. The Constitution of the United States, by apt

* In full in 110 U. S. 421.

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words of designation or general description, marks the outlines of the powers granted to the National Legislature, but it does not undertake with the precision and detail of a code of laws to enumerate the subdivisions of those powers or to specify all the means by which they may be carried into execution. Chief Justice Marshall, after dwelling upon this view, as required by the very nature of the Constitution, by the language in which it is framed, by the limitations upon the general powers of Congress introduced in the ninth section of the first article, and by the omission to use any restrictive term which might prevent its receiving a fair and just interpretation, added these emphatic words: "In considering this question, then, we must never forget that it is a constitution we are expounding" (4 Wheat. 407. See, also, p. 415).

. . . In McCulloch *vs.* Maryland he more fully developed the same view, concluding thus: "We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the National Legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional" (4 Wheat. 421).

The rule of interpretation thus laid down has been constantly adhered to and acted on by this court, and was accepted as expressing the true test by all the judges who took part in the former discussions of the power of Congress to make the treasury notes of the United States a legal tender in payment of private debts. . .

It appears to us to follow, as a logical and necessary consequence, that Congress has the power to issue the obligations of the United States in such form, and to impress upon them such qualities as currency for the purchase of merchandise and the payment of debts, as accord with the usage of sovereign governments. The power, as incident to the power of borrowing money and issuing bills or notes of the Government for money borrowed, of impressing upon those bills or notes the quality of being a legal tender for the payment of private debts, was a power universally understood to belong to sovereignty, in Europe and America, at the time of the framing and adoption of the Constitution of the United States. The governments of Europe, acting through the monarch or the legislature, according to the distribution of powers under their respective constitutions, had and have as sovereign a power of issuing paper money as of stamping coin. This power has been distinctly recognized in an important modern case, ably argued and fully considered, in which the Emperor of Austria, as King of Hungary, obtained from the English Court of Chancery an injunction against the issue in England, without his license, of notes

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purporting to be public paper money of Hungary (Austria *vs.* Day, 2 Giff. 628, and 3 D. F. & J. 217). The power of issuing bills of credit, and making them, at the discretion of the legislature, a tender in payment of private debts, had long been exercised in this country by the several Colonies and States; and during the Revolutionary War the States, upon the recommendation of the Congress of the Confederation, had made the bills issued by Congress a legal tender (see Craig *vs.* Missouri, 4 Pet. 435, 453; Briscoe *vs.* Bank of Kentucky, 11 Pet. 257, 313, 334-336; Legal Tender Cases, 12 Wall. 557, 558, 622; Phillips on American Paper Currency, *passim*). The exercise of this power not being prohibited to Congress by the Constitution, it is included in the power expressly granted to borrow money on the credit of the United States. . . .

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